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No. 626

In the United States Court of Appeals
For the Seventh Circuit

No. 12019

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
OTIS SEARS,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Honorable J. Sam Perry, Judge Presiding.

APPENDIX.

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APPENDIX.

In the United States District Court
For the Northern District of Illinois
Eastern Division

United States of America, Plaintiff-Appellee —vs— Otis Sears, Defendant-Appellant	No. 53 CR 451

STATEMENT IN ACCORDANCE WITH RULE 12-C OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Now comes Otis Sears, Defendant-Appellant in the above-entitled cause, by Westbrook, Holman, etc., et al., his attorneys, and pursuant to Rule 12-C of the United States Circuit Court of Appeals for the Seventh Circuit, states as follows:

1. The suit herein was commenced by the June 1953 Grand Jury which returned an Indictment numbered as above (53 CR 451) which consisted of three (3) Counts. The Indictment bears the date July 3, 1953.

2. Otis Sears, named therein as defendant, entered his plea of not guilty as to all three (3) Counts on October 30, 1953.

3. The defendant had previously posted bond in the amount of Five Thousand ($5,000.00) Dollars. The case was assigned to the Honorable J. Sam Perry, United States District Judge and was tried to the Court.

4. The defendant, Otis Sears, had been arrested on Indiana Avenue near 45th Street on the Southside of

Chicago, Illinois, by a combined force of Federal Narcotic Agents and Chicago City Police. The arrest took place at about 2:15 or 2:20 in the afternoon on November 15, 1952. Prior to the trial, defendant made a motion supported by a Petition for suppressal of the evidence. The motion was denied. Whereupon the defendant stood trial. At the conclusion of said trial, on December 26, 1956, the defendant rested his case and the Court entered a finding of guilty and committed the defendant to the custody of the Attorney General of the United States for a period of five (5) years and assessed a fine against him of One ($1.00) Dollar.

5. On the 9th day of January, 1957, the defendant filed his motion to Vacate the Judgment and a motion for a new trial all of which were denied on the 11th day of January, 1957. On the 11th day of January, 1957, the defendant posted his Appeal Bond in the amount of Five Thousand ($5,000.00) Dollars and on the 21st day of January, 1957, filed his Notice of Appeal.

6. The defendant at the present time is enlarged upon bail.

Alvin A. Turner
Westbrook, Holman, etc., et al.,
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THE INDICTMENT (R. 4)
(filed July 3, 1953)

The indictment upon which the defendant was convicted charged as follows: first count

"The June 1953 Grand Jury charges:

That on or about November 15, 1952, at the City of Chicago, State of Illinois, in the Northern District of Illinois, Eastern Division, the defendant,

Otis Sears,

did unlawfully and wilfully purchase from a person or persons, whose name or names are to the Grand Jurors unknown, and have in his possession, a quantity of a certain derivative of opium, to wit, 60 grains of heroin, which said heroin purchased by said defendant as aforesaid was not then and there in the original stamped package nor from the original stamped package: in violation of Section 2553(a), Title 26, United States Code." R4.

Count 2 R5

"The June 1953 Grand Jury further charges:

That on or about November 15, 1952, at the City of Chicago, State of Illinois, in the Northern District of Illinois, Eastern Division, the defendant,

Otis Sears,

did unlawfully and wilfully sell to James Caldwell for the sum of $50.00, a quantity of a certain derivative of opium, to wit, 60 grains of heroin, not in pursuance of a written order from the said James Caldwell on a form issued in blank for that purpose by the Secretary of the Treasury of the United States: in violation of Section 2554(a), Title 26, United States Code (Internal Revenue Code)." R5.

Count 3 R6.

"The June 1953 Grand Jury further charges:

That on or about November 15, 1952, at the City of Chicago, State of Illinois, in the Northern District of Illinois, Eastern Division, the defendant,

Otis Sears,

did then and there fraudulently and knowingly receive, conceal, buy and facilitate the transportation and concealment after importation, of a quantity of a certain derivative of opium, to-wit, 60 grains of heroin, knowing the same to be imported into the United States contrary to law: in violation of Section 174, Title 21, United States Code.

A True Bill:" R6

Defendant was arraigned and entered a plea of not guilty. R 7 Defendant waived trial by Jury. R8.

EVIDENCE.

Witnesses for Government.

JAMES CALDWELL:

Direct Examination by Mr. Quan.

I live at 4818 South Park, Chicago, Illinois. (T. 17.) • • • I know Otis Sears; I see him in the court room (indicating). (T. 18.) • • • I refuse to tell the Court what happened November 15, 1952, on the ground it may incriminate me. (T. 19.) • • • I knew the defendant, Otis Sears, about a year before this case came up; before November 15, 1952. As to whether I knew the defendant on or about November 15, 1952, I don't remember the date. (T. 21.) • • • I knew him a year before this case came up. I don't remember if I knew him in 1951. (T. 22.) • • • I don't remember whether I saw him or not on or about November 15, 1952. I don't know where I was November 15, 1952. (T. 23.) • • • I was in Chicago November 15, 1952 but I don't remember where I was in Chicago. (T. 24.) • • •

(Colloquy between Court and Counsel.)

On November 15, I was in the Narcotics Bureau at 11th and State with Cassidy and Joe Galvin. (T. 32.) • • • They are police officers. I think Federal Narcotics Agent Hazer was there but I wouldn't know his full name. (T. 33.) • • •

(Colloquy between Court and Counsel.)

Nothing took place other than conversations. I don't know how to explain it. (T. 37.)

(Further colloquy between Court and Counsel.)

I don't recall how long I was at 11th and State on November 15, 1952. I don't remember what time I left, either. (T. 41.) • • • To be frank, I don't know how long it was. (T. 42.) I left 11th and State sometime in the afternoon of November 15, 1952. (T. 43.) • • • I left with police officers Cassidy and Galvin and the other fellow who I guess was Federal Narcotics Agent Hazer. (T. 44.)

(Colloquy between Court and Counsel.)

JOSEPH P. GALVIN:

Direct Examination by Mr. Sodergren.

My name is Joseph P. Galvin, address 1244 West 97th Place. (T. 51.) I am a Chicago Police Officer and was serving as such November 15, 1952, assigned to the Narcotics Division of the Detective Bureau. I am familiar with Otis Sears. (T. 52.) • • • I first saw the defendant, Otis Sears, November 15, 1952, being one of several officers that arrested him. (T. 53.)

(Colloquy between Court and Counsel.)

On November 15, 1952, I was one of three officers that arrested Sears. I believe it was around 2:00 p.m. in the afternoon. The first time I saw Mr. Sears, was on the corner going toward the corner of 46th and Indiana

Avenue. (T. 57.) The other officers were Eugene Cassidy, my partner, and Federal Narcotics Agent Hazer. James Caldwell was also present. I had seen Caldwell the night of the 14th of November. Having arrested him, I saw Caldwell where I saw him again the day of November 15th. (T. 59.) I saw Caldwell in our office at 1121 South State Street. Present were my partner Cassidy and Federal Agent Hazer. We searched Caldwell and we gave him five $10 bills in marked money. When I say "we", I refer to Hazer, Cassidy and myself. (T. 60.) Caldwell was searched and he had nothing on him at the time. We gave him five $10 bills in marked money. (T. 61.) The money I refer to was given to Caldwell in five $10 bills; we had taken the serial numbers. (T. 63.) I believe Hazer wrote the numbers of the bills on paper. I examined that paper and compared them with the bills in the presence of Hazer, and I saw him make the entries on the paper. I knew they were true and correct. After giving the bills to Caldwell, we took Caldwell downstairs and got in Hazer's automobile; we proceeded to 46th and State Streets, where we stopped; officers Cassidy and Caldwell went into a drug store. (T. 64.) Cassidy went to a phone booth with Caldwell and Caldwell made a phone call. Then both of them came out of the drug store and came back to the car, and got in the car. (T. 65.) After Cassidy and Caldwell returned to the automobile, they got back into the car and Agent Hazer drove to a filling station on the southwest corner of 47th and Michigan, and parked in the filling station. At that time I got out of the car, walked east on 47th Street and stood in an entrance into a store; a delicatessen and meat market. After about two or three minutes, Caldwell passed me walking east on the north side of 47th Street.

I was on the north side of 47th Street about six or seven doors east of Michigan Avenue. Hazer stayed in the car, and officer Cassidy was about directly across the street from me on the south side of the street. The car was parked in the gas station on the side to the south side of the gas station on the southwest corner of 47th and Michigan. (T. 66.) After I took my position on the north side of 47th Street, about three minutes elapsed, and Caldwell passed me walking east on the north side of the street. I stood at the entrance to this store and watched him cross the alley going east and turn into a store. I saw him enter a record shop. I didn't see him again then for about five or eight or ten minutes. Then I was walking west on the north side of the street and he passed me. (T. 67.) I believe five, eight or ten minutes elapsed before James Caldwell came out of the store. (T. 68.) The three minutes that elapsed was when I left the car before Caldwell came past me. When Caldwell came back, I was walking west on the north side of the street; I was all alone. I followed him back to the car that was parked at the gas station. Cassidy filled in behind me and then we talked to Caldwell. We proceeded north on Michigan Avenue and let Caldwell out of the car on the northeast corner of 46th and Michigan. We watched him walk east on 46th Street to 46th and Indiana.

We then sped around the block to 45th, came back south on Indiana, and parked in front of about 4534 or 4532 Indiana Avenue. I guess I'd say we stopped and watched him walk towards the corner of Indiana, which is a block; we probably waited there a minute. We watched him walk towards the corner of Indiana. (T. 70.) When we left he was practically at the corner. He was ten or fifteen feet from the corner. It is a good view there, you can see. He had ten or fifteen feet to

go eastward to get to the corner. (T. 71.) Arriving at 4534 or '32, I got out of the car; there is a three-flat building there with large pillars on the front porch; the pillars are about two foot square, holding up a big roof. I walked up about four or five steps and stood behind a pillar and watched Caldwell standing on the corner of 46th and Indiana. The other officers, Cassidy and Hazer were parked directly below me. (T. 72.) After a wait of about ten or fifteen minutes, I am guessing at the time and it could have been a little longer or a little less, I heard a whistle the first time I looked up. I didn't pay any attention to it. I heard somebody whistle and I happened to look south on Indiana Avenue, and saw Caldwell walking north on the west side of the street towards me. A man was walking up to meet him. Cassidy and Hazer pulled away from the curb, raced down the street and jumped out. (T. 73.)

The other man was walking south and Caldwell was walking north; the other officers stayed in the car. They left me at the pillar. They took the car with them and went down the street which would have to go about 200 feet, I would say, from 4532 to 4554 or '58 Indiana Avenue. As I saw them jump out of the car, I started walking out on Indiana Avenue, at that time they were searching two prisoners. At the time I noticed a man walking towards Caldwell; I was probably 200 or 250 feet from James Caldwell. (T. 74.) I walked up, and the two officers and Caldwell and Mr. Sears were standing in front of 4558, and Hazer and Cassidy were searching them. Mr. Sears was the gentleman that was walking up to Mr. Caldwell; they were walking in a normal manner, one towards the other. I didn't see anything unusual as they approached each other. I didn't pay any attention to anything, and I heard a whistle; I was too busy watching Caldwell.

The Mr. Sears I refer to is the defendant in this case. (T. 75.) Officer Cassidy had taken the five $10 bills from Sears and was comparing the numbers, reading the bill numbers to Mr. Hazer, who had the paper with the numbers written on it, verifying the money that we had given to Caldwell earlier. I was there and verified the numbers myself. The serial numbers on five $10 federal notes matched those on the paper. Then Hazer searched Caldwell and found a small brown paper envelope, and took that from Caldwell's pocket. I saw that envelope, it had no stamps or anything on it. (T. 76.) Nothing was found on Caldwell. (T. 77.) We went back to a building; I believe the address was 4538 Indiana. (T. 78.) The exact moment I first laid eyes on that envelope was as I walked up the street and Hazer was searching Caldwell. Hazer had it in his hand, I can't say which hand. (T. 80.)

(It was stipulated that the numbers on the piece of paper were identical numbers on the $10 bills.)

The $10 bills were attached to and made a part of Government's Exhibit 1, which was the sheet containing the numbers. (T. 81.) My signature appears on this sheet of paper. I signed it the 15th, previous to giving the money to Caldwell at 1121 South State Street in the presence of Hazer and Cassidy. (T. 81.) My initials "JGP" appear on Exhibit 2. The initials were entered on that Exhibit immediately after we got to 11th and State Street, back to our office on November 15, half hour or 45 minutes after apprehension of the defendant. All of us were present, the prisoners and the three of us in the case. It remained in the same condition from the time I got it until my initials were put on it, and it remained in the possession of the three of us. (T. 83.) I saw this instrument again on the street at 46th and Indiana when Cassidy was comparing the num-

bers of the bills against the numbers of this paper. This was when the defendant was arrested. I did not see the $10 bills taken from the defendant. All I saw was either Officer Hazer or Cassidy with the money in their possession. (T. 85.) After they had apprehended the two men. I don't recall the name of the establishment Caldwell entered. I believe the address was 102 east but I can't say for sure. All the facts testified to took place in Chicago, Illinois. (T. 85.)

Cross Examination by Mr. Holman.

When we left 11th Street, Hazer was driving the car and continued to drive it up until the time of the arrest. When the two men were arrested on the corner of 46th and Indiana, Hazer had just gotten out of the car to walk across the sidewalk to participate in the arrest. At all times when someone was under the wheel of the car, Hazer was the someone, and Hazer was under the wheel driving when the car was in motion. I did not go inside when the car stopped on State Street. (T. 86.) The stop was at a drug store on the northwest corner of 46th and State. It was four years ago and the details are coming back little by little. They are pretty square in my mind. (T. 87.) I could come out to date on it pretty well. I could be in error about 46th and State, and it could be that the car stopped at 45th and State. If all the other witnesses said it stopped at 45th and State, that could be right. I am hazy on that detail. We then went on to the filling station and I got out first. (T. 88.) 45th and State and 46th and Indiana are in the Fifth Police District of Chicago. I worked in that district two years. (T. 89.) During those two years, almost daily, I was in the immediate territory of 47th and Michigan and 46th and Indiana, and the surrounding territory, and I am quite familiar with it. The

gas station is on the southwest corner and the whole of Michigan Avenue is in front of the gas station. As to whether I make mistake number two in reference to the address being 120 instead of 102 where Caldwell ultimately entered, I said I wasn't sure of the address. (T. 90.) I can't swear that it was ether 102 or 120. 120 is a considerable distance down from 102, and 102 would be closer to the gas station. (T. 91.) And it would likewise be easier to see the record shop, but the 120, is approximately nine doors down. I crossed from the south side of the street at the corner. I believe I walked west on the south side of the street and then crossed over on the east crosswalk to the north side of 47th Street. There is one building between the corner and the alley but there are about six stores on the ground floor, I believe. (T. 92.)

Looking at Exhibit 2, the building I have my thumb on is at the extreme left side, and it has been there long before I ever went to Wabash (Wabash and Fifth District are synonymous). It was there before November 15, and that is the building that goes down to the alley. There are stores back here. (T. 94.) Looking at Exhibit 1, I see a row of buildings in which 120 is located and the alley. Putting Exhibits 1 and 2 together, the building extends down to the alley. Number 2 extends to the alley, and Number 1 begins from the alley south. And 120 would be right next to it. (T. 95.) The gasoline station has been there as long as I can remember. Long before I went to the Station and it was there November 15, and in the same condition as it was all the other times. The gasoline station itself has not changed. Hazer parked back where the fence is now but wasn't here at that time. Where the fence is now used to be a parking lot. (T. 96.) It was open space. The people waiting in the car had to look down and

beyond all of that; down and beyond and into 120. I never went across the alley at any time. I went to one of the doorways—two or three doors in this part of the building. (T. 97.) The buildings shown on Exhibit 1, the row of one-story buildings, right east of 118. I never paid any attention before.

I never did see Caldwell after he went into the store that he went into. I saw him cross the alley and make the turn and I lost him then. I don't know with whom he came in contact after he turned into the store. (T. 98.) I don't know who he talked to. I don't know who might have had traffic with him in any form or fashion, and he was completely out of my vision as he turned. We gave Caldwell enough time to get practically to the corner, 10 feet away, before we pulled away. There probably were cars parked along the street on 46th between Michigan and Indiana, as there always are. It is a pretty busy neighborhood and was on November 15, 1952. (T. 99.) Then we went to 45th and Michigan where there are stop lights south. We were lucky enough to catch the green light and as we sped into the green light, we did not have to stop. I don't remember whether there is a vacant corner on 46th and Indiana. Caldwell took his position on the Northwest corner and I don't remember whether there is a vacant lot on that northwest corner or not. (T. 100.) When we were speeding north on Michigan, we couldn't see Caldwell on the northwest corner of 46th and Indiana. I don't know with whom he talked, nor with whom he might have trafficked. And Officer Cassidy and Agent Hazer were sitting in the same car with me, and were equally as far away from Caldwell as I was, and as we sped eastward on 45th Street, we couldn't see Caldwell down there at the corner, and I don't know what he was doing. (T. 101.)

I don't recall whether there were stop lights on 45th and Indiana November 15, 1952. I think Michigan Avenue was the only street with lights; I am positive they were on Michigan but I can't say whether or not they were on Indiana; I do not recall having to stop for any lights on Indiana or for anything else. We sped around the corner. From 45th to 46th on Indiana is an average block. (T. 102.) The arrest was made in front of 4558 Indiana. I can't say how far it is from the corner; it is near the corner and there might be a vacant lot there. I can't say; I don't know as to whether that building is on the corner or whether there is a vacant lot on the corner. I don't know whether Officer Hazer was closer to the center of the street or closer to the curb; I don't know whether he parked double or whether he parked at the curb. (T. 103.) When I got out, we were parked at the curb and I am positive that I was standing on the porch at 4534. I could see Caldwell on the corner. On Exhibit 8, I see the big pillar where I stood. (T. 104.) I was not standing in between the pillars but on the stairway or porchway itself, facing south. I still don't remember, and that does not refresh my recollection of the vacant lot, but I was still able to see Caldwell from the porch. I had not seen him as we sped from 45th into Indiana. (T. 105.) Looking at Exhibit 4, it does not bring back anything at all. (T. 106.)

(Colloquy between Court and Counsel.)

I can't say that Exhibit 1 portrays the layout of the store on 47th Street. (T. 109.) I couldn't say anything about Exhibit 1 according to this picture. Exhibit 2 portrays the territory of 47th and Michigan. (T. 110.) Exhibit 3 is the way the gas station looked on November 15, 1952 in a general way other than the fence. (T. 111.) I can't identify Exhibits 4, 5, 6 and 7. (T. 111-112.) The porch on Exhibit 8 looks familiar and it

appears to represent the general territory it purports to. I see two buildings on Exhibit 9. (T. 113.) I didn't pay any attention to the two porches on Exhibit 9, nor did I pay any attention to 4528. (T. 114.)

The Court: We are spending an awful lot of time on a lot of inconsequential things.

If I were the Government's attorney, I would admit that these were all photographs of the territory they purport to represent, and that would save a lot of time on it.

For the purpose of cross examining this witness they are admitted.

Mr. Holman: Thank you, Judge.

The Court: I don't like to waste time on photographs. They may be admitted without any objection as to foundation, unless there is something serious. Go ahead.

Caldwell was at 46th and Indiana and he was facing the car, the car was going towards him, as we turned into 45th and Indiana. After the car headed back south on Indiana, the first time I saw him was when we parked at the curb in front of about, I am guessing addresses now, 4532, 34; at the curb we parked, you could look directly across the parkway to the corner and see Caldwell standing there, and that is the first time I saw him after letting him out at 46th. (T. 116.) As we turned the corner, we didn't see him; as we drove south we didn't see him, and don't know who if anyone he might have talked to. Just prior to the time I heard the whistle, I was standing on the porch, facing south, watching Caldwell; I had been looking south all the time. There were not too many other people that day; I wouldn't guess as to the number; I have no recollection. (T. 117.)

Caldwell was the only one at the corner, but other people came and went, but I never lost track of Cald-

well; I kept Caldwell under observation. People were coming and going on that side south of the street, going north and going south. (T. 118.) The first time Caldwell moved off the corner, he started walking north on Indiana at the whistle. I don't know who made the whistle. The car drove about 200 or 250 feet and let the officers out, and they placed the men under arrest before I could reach them walking on foot. Caldwell and Sears were searched. (T. 119.) There was a third man searched later on in the building. I did not see the third man on the street that afternoon they were searched and I didn't see anything taken out of either man's pocket. (T. 120.) I did not hear or see either man say or do anything to each other. (T. 121.)

Redirect Examination by Mr. Sodergren.

Between the hearing of the whistle and the first moment I saw the defendant, it was almost immediately. (T. 121.) I took a second look following the hearing of the whistle and that was the first time I saw Sears. (T. 122.) * * * From the time we left Caldwell off on the northeast corner of 46th and Michigan until we parked in front of 4534 Indiana Avenue, it took maybe two minutes. (T. 123-124.)

Recross Examination by Mr. Holman.

I would say it took approximately two minutes to travel a block north on Michigan, a block east on 46th Street, to turn into Indiana Avenue, and come back to about the middle of the block, 4538, something like that. It might have been more or less, but not much. Put it this way, as fast as we could get there. (T. 124.)

(Witness excused.)

THEODORE HAZER:

Direct Examination by Mr. Quan.

My name is Theodore Hazer; I live in Omaha, Nebraska. In 1952 I was employed by the Federal Bureau of Narcotics. I was a narcotics agent approximately three years and was so employed November 15, 1952. (T. 126.) I was stationed in Chicago with duties of apprehending narcotics peddlers and sources of supply. I know Sears and see him next to counsel. I first saw him November 15, 1952 when he was arrested by Cassidy at approximately the corner of 46th and Indiana. (T. 127.) Caldwell also was present at that time. I had seen Caldwell the first time at the Police Station at 11th and State, Chicago, Illinois, November 15, 1952. Present when I first saw Caldwell were officers Cassidy and Galvin. (T. 128.) At 11th and State, I met the officers and Caldwell; I read off the serial number of the United States advance funds to Cassidy, who made a list. (T. 129.) And Cassidy typed; it was five $10 bills. After we made the money list, we searched Caldwell's person. (T. 130.) There was nothing in his pockets or on his person, no narcotics or no money.

I gave Caldwell five $10 bills. (T. 131.) Caldwell, Cassidy, Galvin and myself proceeded to the vicinity of 45th and State approximately, it might have been 46th and State, to a drug store where Cassidy and Caldwell got out of the car and went into the drug store. We then proceeded to 47th and Michigan. I parked in the gas station on the southwest corner of 47th and Michigan. I parked in the gas station on the southwest corner of 47th and Michigan in the rear of the gas station and to the side. (T. 132). Galvin got out of the car, crossed the street to the northeast corner of 47th and proceeded east.

After he went approximately 30 feet from the corner, I let Caldwell out of the car. Caldwell proceeded to Otis Sears' record shop. Then Cassidy left the car, to the best of my knowledge, and proceeded east on 47th Street from the southeast corner. (T. 133.) This all happened in a minute to three minutes. I stayed around the station; I was in and out of the station, around the gas pumps; walking around watching the officers and Caldwell. I watched Caldwell when he entered Otis Sears' record shop at 120 East 47th Street and we waited a few minutes. I watched Caldwell when he came south.

We all met back at the car; Caldwell came back to the car, and Galvin came back. (T. 134.) At that time after he came back to the car, we all got in. I searched Caldwell again; I found no money, no narcotics, no nothing on Caldwell. We then proceeded to the corner of 46th and Michigan. (T. 135.) That would be officers' Galvin and Cassidy, and myself and Caldwell, at 46th Street and Michigan. I believe Michigan is the right street; it was a block west of Indiana; we let Caldwell out of the car and watched him as he walked east to the corner of 46th and Indiana on the north side of 46th Street. I was driving a government car; I drove the car around the block; I drove down to 45th Street, around the corner, came around the corner of Indiana and double parked; at approximately 4530-4538, in that vicinity, I double parked. At that time Officer Galvin left the car and took a position almost abreast with the car on a porch of one of the houses on the west side of the street. Officer Cassidy and myself sat in the car for approximately two to four minutes; we were observing Caldwell on the corner where he was standing; we were keeping him under observation. Approximately two or four minutes later I heard a whistle.

(T. 136.) My attention was attracted to Otis Sears who was the only one on the sidewalk near the car at the time.

I could tell from what direction the whistle came. (T. 137.) It came from where Sears was standing; there was no one around him at the time; he was right near the car. At the time of the whistle, Caldwell started walking towards Sears, when they were abreast of each other approximately, Sears reached down with his left hand, Caldwell crossed over with his right hand, their hands met for a moment, they hesitated for a moment while their hands met; at that time I pulled the car up abreast of Sears and Caldwell; Officer Cassidy jumped out of the car and ran over to Sears; I had jumped out of the driver's side, I suppose, about 10 feet behind Officer Cassidy. (T. 138.) I grabbed Mr. Caldwell, Sears was approximately five, six or maybe seven feet to the north of Caldwell. (T. 138-139.) Caldwell said, "It's in my right-hand coat pocket." I reached into Caldwell's right-hand coat pocket and pulled out a brown Manila envelope with a substance in it. I took it from Caldwell. Officer Galvin was almost immediately on the scene from his vantage point. I saw Officer Cassidy remove some money from Sears' person. (T. 141.) I took out the money list that Officer Cassidy had typed at 11th and State.

Cassidy read the serial numbers on the money taken from Sears; I checked the list and the serial numbers were identical with the serial numbers on the list; the serial numbers on the money were identical with the serial numbers taken at 11th and State. I had seen this money before Officer Cassidy removed it from Sears; it was when I gave it to Caldwell to purchase narcotics. (T. 142.) I instructed Caldwell at the time I gave him this money to use the money to purchase narcotics with

from his narcotics source of supply. Government's Exhibit 1, a list of serial numbers of the money that was taken from Sears' person, was made at 11th and State November 15, 1952, prior to Otis Sears' arrest. (T. 143-144.) The money is the same money I gave Caldwell on November 15, 1952 in Chicago to purchase narcotics with. This money was last seen by me when I gave it to Caldwell to purchase narcotics from his source of supply. (T. 144.) The yellow bears my signature and that of Galvin and Cassidy. We all signed it November 15, 1952. These are the same bills which were removed from Otis Sears. (T. 145.) Government's Exhibit 2 is the envelope I removed from Caldwell's person November 15, 1952, from his right-hand coat pocket at the time of Sears' arrest. I took the envelope to 11th and State wth the substance in it. We initialed the envelope and dated it November 15, 1952. (T. 146.)

I took the envelope to the Bureau of Narcotics Office and locked it in my desk drawer on that day; I removed the envelope November 15, 1952 from my desk drawer, transferred the substance from this envelope to another small envelope or package, and submitted it to the United States chemist for analysis. (T. 147.) I opened that desk drawer on November 17, a Monday, to get some papers out of my desk to carry to Milwaukee, Wisconsin. Exhibit 2 was in the drawer at that time. I left the evidence in the envelope in the desk drawer; locked it up and left. I saw it, Exhibit 2, again November 18. (T. 148.) It was at the Bureau of Narcotics Office at the time I transferred the substance from this envelope to another envelope and at which time I submitted this envelope. (T. 149.) Government's Exhibit 3-C, I saw November 18, 1952 when I transferred the substance from Exhibit 2 and inserted it in an evidence

envelope and submitted it to the chemist for analysis. I know it by it being initialed by me and Agent George Emmrick, he is agent in charge of the Milwaukee Office. (T. 150.) After I placed this Government's Exhibit 3-C in the evidence envelope (3-B—T. 149), I submitted them to the United States Chemist.

Exhibit 3 is the envelope that I used to place that glassine envelope (3-C) in, I know it by the initialing. Exhibit 2 had no stamps on it when removed from Mr. Caldwell. (T. 151.) Caldwell had no Treasury form on him when this package was removed; except for the markings, these Exhibits are in the same condition. (T. 152.) All I testified to took place in Chicago, Cook County, Illinois. (T. 153.) I delivered Exhibit 3 to the Chemist November 18, 1952, Seventh Floor of the New Post Office Building at Canal and Van Buren, Chicago, Illinois. (T. 154.)

Cross Examination by Mr. Holman:

I have been here since Tuesday waiting to testify; have conferred and talked with Mr. Quan, Government's Attorney, about the case and read the transcript of my testimony before Judge Perry back in May; I have not read it verbatim but glanced through it and read sections of it. (T. 155.) Within the last three days while waiting here to testify I have refreshed my recollection on some portions of the testimony that I gave before Judge Perry. I was driving the car when we left 11th Street the afternoon of November 15 and proceeded to 45th and State; at all times I was driving the car; no one else drove but me; Officer Galvin sat in front with me, Caldwell and one of the officers sat in the rear, Caldwell was not handcuffed; our car had no markings on it that would distinguish it. (T. 156.) It was just an ordinary '49 Buick.

I did not search the car the afternoon of November 15; I did not search the back seat of the car at the gas station; Caldwell had been riding in the back seat of that car and I don't believe he was ever handcuffed; he rode in the back seat of the car from 11th and State to 45th Street and then got out. I did not get out of the car with him but another officer did. It was on 47th Street that I got out of the car when he went to Sears. He got out of the car twice; he got out at 45th and State; and 47th Street is my mistake. There is nothing else that I am mistaken about that I can think of now. (T. 158.) I did not go into the drug store with him. I did not search the back of the automobile to see if he had left the money in the back of the automobile. When he came out, we went to the gas station and he got out and went to the record shop. I searched him when he came back; but I did not search the back of the car to see if he had left the money in the car. To the best of my knowledge, he was not handcuffed at anytime. (T. 159.) When I searched him at 11th and State, I did not strip him naked; I searched him by padding him down; I did not take his underwear off; I don't recall if he took his shoes off at 11th Street; he did not take his shoes off at the gas station.

I took his coat off. (T. 160.) I reached and I checked all his pockets. I put my hands inside all his coat pockets and pulled them out. I took off his coat so that he was standing there in his shirt. I checked all of his pockets, then I began with the top of his head and started going down; I checked his collar. (T. 161.) I put my hands in it. I turned it up. Then I go down his sleeves, I checked his sleeves, the seams in his sleeves, I come back up the sleeves and around his arms, I start going down his body. At the gas station I began giving him a search; I checked his pockets. His coat was still on at the gas station; he had a trench coat on, something of that sort; I did not take

that off at the gas station. (T. 162.) I don't recall that he had a dress coat on at the gas station; he had on the trench coat and I believe it was a short one underneath. I don't believe he had a jacket underneath; I don't recall exactly. I did not take his trousers off at the gas station; I did not take his shoes off nor his socks at the gas station. He had been out of my presence approximately five minutes more or less; I couldn't say if it was more or less. (T. 163.) If Officer Galvin said it was five, eight or ten minutes, I would say that he was about as right as I am now. I imagine it was five, eight or ten minutes. I did not see him in the shop; I don't know who he talked to in the shop; I did not see what he did with his hands while he was in the shop. He had on the same trench coat when he returned from the shop as he had when he went in. (T. 164.)

The search took place in the back of the automobile itself. I never looked down behind the cushions of the back seat. I did not search him at 46th and Michigan before he got out of the car. (T. 165.) I did not search him any more after I searched him after he had gotten back in the car at 47th; the search was not on the ground, it was in the back seat of the car. I got out of the back seat, got under the wheel and proceeded to 46th and Michigan. He alighted from the car. I did not search him as he alighted from the car. He had been riding in the back seat with the police officers from the gas station to 46th Street. (T. 166.) He was unhandcuffed. Getting back to the first search, I never did strip him nude from the time I first saw him at 11th Street up until the arrest. I don't know what kind of underwear he was wearing as distinguished from BVD's, shorts, longs, or what. I had his short open but I don't recall what his underwear looked like. I did not take his trousers off. I did not pull his trousers down to search his inside pockets. (T. 167.) As

he opened his trench coat, I do not know whether there was any inside pockets down inside his trousers or not. I do not know what kind of shoes he had on.

I saw Agent Emmrick's name or initials on one envelope, the glassine envelope that the substance was transferred from when it was transferred from the Manila envelope; I believe his initials were on the glassine envelope and on the evidence, the large evidence envelope. (T. 168.) I witnessed his initials and he witnessed mine; we were physically looking at each other. That was here in Chicago on November 15, 1952. Emmrick was an agent in Chicago; he did not share the same room I shared. (T. 169.) I asked him to come in the room to witness it. One agent occupies a desk. If a superior officer wanted to get in that desk, he would have to break the desk open; to the best of my knowledge there was never a master key. A superior officer would have to wait until the other officer came back to get in the desk. If the other officer never returned, the superior would have to break it open and put on a new lock. (T. 170.) Caldwell had no diary or billfold on him that I was able to find. I could see Caldwell on the way as he walked towards Indiana from 46th. It took him about half a minute to get down to the corner after he had alighted; I imagine it took him about 30 seconds to walk a block. (T. 171.) It was an east-and-west block, not a north-and-south block.

We then proceeded to 45th Street which was a north-and-south block. Caldwell was let out of the car at 46th and Michigan. (T. 172.) And approximately north on Michigan to 45th Street, that is a north-and-south block from 46th down to 45th. I made a right turn east. (T. 173.) The first part of the journey was north on Michigan Avenue from 46th. I couldn't see Caldwell after I pulled away from the corner; I do not know whether or not he stopped and talked to anybody; I did not see him stop

and talk to anybody. I don't recall exactly whether there are lights at 45th and Michigan, I believe there are. (T. 174.) I believe the light was green; I don't recall exactly but we would have run a red light. We then proceeded east until we got to Indiana Avenue, and during that journey we didn't see Mr. Caldwell nor did we see what he was doing; he was completely out of the vision of the car, and its occupants. Then I swung south, approaching where Caldwell was standing. (T. 175.) I saw him before I parked the car. I double parked to let Officer Galvin out. We double parked all the time, and before the arrest we never did pull into the curb. Cassidy was on the front seat with me; he was between me and whoever was on the sidewalk. (T. 176.) I was to the left of Cassidy.

If someone were south of Cassidy, he wouldn't be between me and the individual, both of us would be looking towards the South. I estimate it took approximately 30 seconds, half a minute or so, to go from 46th to 45th on Michigan; my estimation is that it took about the same time to go in an automobile that it took Caldwell to walk his block, and I was driving as fast as I could drive and be safe. When I came around 45th and Indiana, I slowed the car down because I didn't want to alert anybody in the neighborhood. But then I had Caldwell come around the corner, we could see Caldwell on the northeast corner, at least I saw him when we come. (T. 177.)

We were double parked two to five minutes before I heard the whistle, it could have been as much as ten minutes; I don't believe it could have been fifteen. After the whistle, the car travelled from 20 to 50 feet, not over 50 feet. (T. 178.) If Officer Galvin says it was 200 to 250 feet, I wouldn't say he was mistaken; there is a possibility that I might be mistaken since I haven't been in the area since or before. If Officer Galvin said we waited ten to fifteen minutes, I would say if it was ten minutes we

possibly both could be right; I believe I said two to four minutes, possibly ten minutes. I believe that I thought my statement was two to four, possibly ten minutes. (T. 179.)

People were walking along on the streets between the gas station and the record shop that Saturday afternoon; people were walking to and fro between me and Caldwell. I didn't see Sears at all before I heard the whistle. At the time I heard the whistle, I saw Caldwell start walking towards Sears, and Sears was walking towards Caldwell at that same time. (T. 180.) Other than walking, there was no other motion or signal or anything like that before the whistle; when their hands met, they both hesitated. I saw the hands come together but I couldn't actually see any objects exchanged from one person to the other. Between the whistle and the arrest, Caldwell said nothing that I heard. (T. 181.) He said nothing to Officer Cassidy when he was walking towards Sears. There was not a third man searched at the scene. There was a third man that was padded down for a gun in the vicinity. That was approximately fifty to one hundred feet back north of the scene of the arrest. (T. 182.) The man was in a house. I glanced at the testimony I gave on the motion to suppress; Exhibit 2, the original brown package, I recall now that I did not have it and it was not present when I testified before Judge Perry the first time and I did not know where it was at that time. (T. 183.)

I sent that package (Exhibit 2) to the fingerprint expert to be fingerprinted. The original container for Exhibit 2, which you are holding in your hands, the procedure would be to send it to the fingerprint expert. And I sent this Exhibit to an expert. (T. 184.) I don't know whether Sears' fingerprints are on there or not, we never got a full report because the fingerprint expert died. I hadn't seen the original container, Exhibit 2, since November 18,

1952, until I came back to testify in this case at this time and Mr. Quan showed it to me Tuesday or Wednesday of this week. (T. 185.) I did not see the red sticker markings on Exhibit 3-C of this date at the time it was put on. I believe it is the chemist's signature, John Endriz, although I can't recall of my own knowledge which chemist it was. (T. 186.) I took the substance from the Manila envelope that had gone to the fingerprint man; and I resigned from the Narcotics Service June of 1955. I don't know when the fingerprint man died. To the best of my knowledge, the Government had only one fingerprint man in the department I work in; he was not our expert, he belonged to the Alcohol Tax Unit; worked for them and we sent our material there. (T. 187.) So the Tax Unit and the Narcotics Unit combined only had one expert. To the best of my knowledge, I couldn't say whether Sears fingerprints are on there or not. (T. 188.) Exhibit 3-C, I placed in a large Manilla envelope; Had Mr. Emmrick witness my closing and sealing it; then I took it to the chemist's office on the Seventh Floor of the New Post Office Building; my office was on the Eighth Floor. (T. 189.) The chemist came and stuck the evidence envelope in the machine to record the time and date which shows November 18, 10:59 a.m., 1952, Laboratory, Alcohol Tax Unit, Chicago, Illinois; the initials of both chemists. (T. 191.) They are John Fonner and John Endriz. I left it (Exhibit 3) with those gentlemen and they in turn initialed an evidence form that we take with us listing the evidence; We give them several copies and they give back a copy that is initialed, showing that they received it, that goes into our file. (T. 192.) The two chemists kept the evidence container, Exhibit 3, and I walked away. I testified in May of 1955 before His Honor; I have seen this Exhibit at the hearing. (T. 193.) The next time I saw it, after I left it with the chemist, was when it was going to be

used in the State prosecution by the State's Attorney of Cook County in the prosecution of Mr. Sears. (T. 194.) I did not give it to the police officers. (T. 195.) This Exhibit 3 of December 19, in time; I got from the chemist; I gave them a receipt for it, it was wanted in the State Court and I later returned it to the chemist; he did not stamp it and go through the same procedure that he did the first time.

He just initialed the receipt. It was in my possession for use in the State Court, I imagine two hours. (T. 196.) It wasn't used in the State Court. It was in my possession the whole two hours. I did not give it to the police officers for use in the State Court. I did not give any of these Exhibits to the police officers for use in the State Court. To the best of my knowledge, I did not give the money to the police officers for use in the State Court. During the two hours that I had this out of the possession of the chemist, I carried it in a Manila folder that I carry my case reports in when I go to Court. (T. 197.) I don't recall which chemist I gave it to when I took it back. The chemist walked towards the evidence vault with it. To the best of my knowledge, that is the last time I saw it until I saw it back in this Court on the motion to suppress. (T. 198.) I recall that Exhibit 2 couldn't be located when the motion to suppress was heard in this Court Room; I don't know where it was, I believe Agent Christopher located it; I don't know where he located it from and I don't know whose possession it had been in. (T. 199.) It had to be either the Alcohol Tax Unit's fingerprint division or our Bureau. I don't know which place it was. To the best of my knowledge, Sears and Caldwell at the time of the arrest were turned around in the same direction, facing south. To the best of my knowledge this case wasn't tried in State Court. (T. 199-200.) At the time I arrived with the evidence in State

Court it was all over and at the time I understood that it didn't get to Court. If it did, I wasn't present, the evidence was in my possession, so I don't see how it could have went to State Court with the evidence in my possession, although it is possible. Maybe it did. (T. 201.)

Redirect Examination by Mr. Quan.

At the time I took Government's Exhibit 3 to State Court, 3-A was attached thereto and sealed. It was not opened by me in State Court at any time after I got to State Court; I understood it was all over so I brought the evidence back to the United States Chemist, turned it back to him which he initialed a receipt for. (T. 202.) When I came around the corner of 45th and Indiana, Caldwell was visible. (T. 203.)

Recross Examination by Mr. Holman.

Exhibit 2 of this date, initialed 11-15, did not go to the fingerprint man that date; that is the date we initialed it at 11th and State after we took it off the person of Caldwell. Those are the police officers' initials and my own. I kept it until I handed it to the fingerprint expert at my office. (T. 204-205.)

EUGENE CASSIDY:

Direct Examination by Mr. Quan.

My name is Eugene Cassidy; I reside at 10701 South Sawyer Avenue; I am a police officer, City of Chicago, Eleven Years. (T. 205.) I was a police officer November 15, 1952, assigned to Narcotics Section, Detective Bureau. My duties were to arrest violators of norcotics laws or any other laws. I know Otis Sears, he is the man over there (indicating) (T. 206.) I saw him November 15, 1952 at

about 4654 South Indiana Avenue. I placed him under arrest. We arrested another man, James Caldwell; I had seen Caldwell November 14, 1952 about 9:00 o'clock or so in the evening at 48th and South Parkway. (T. 207.) I arrested him in his home; I can't recall the address. It was in the vicinity of 48th and South Park. My partner, Joseph Galvin, and myself arrested Caldwell and took him to the Detective Bureau at 1121 South State Street; we questioned Caldwell as to his source of supply. (T. 209.) After questioning him, we took him out to make a purchase of narcotics, this was on the 15th. (T. 210.) We questioned Caldwell at 11th and State and booked him. The following day, November 15, we questioned him again. Lieutenant Healy contacted Government Agent Christopher and Agent Hazer was sent over. We gave Caldwell $50.00 in currency. (T. 211.) Agent Hazer actually gave him the $50.00. Myself and my partner, Galvin, were present. We gave Caldwell the $50 to make a purchase of narcotics. (T. 212.) He was instructed to make a purchase of narcotics for us from Otis Sears. Just before giving Caldwell the $50, I searched Caldwell. (T. 213.) I believe it was my partner Galvin and myself that searched him. We found nothing at all on him, no money, no narcotics. We went in Hazer's automobile to the vicinity of 45th and State Streets where we stopped at a drug store, myself and Caldwell went into the drug store where he made a phone call. (T. 214.) After the phone call, we proceeded to 47th and Michigan where we parked in the rear of the gas station on the southwest corner of 47th and Michigan. Caldwell got out of the car. First Officer Galvin got out, went east on 47th, and stood in a door way; Caldwell got out of the car, proceeded to the record shop at 120 East 47th. Agent Hazer and I stayed in the gas station; after Caldwell went into the record shop, I crossed the street on the southeast corner approximately one door east of Michigan and stood in the doorway there.

After about five minutes, Caldwell came out of the record shop, passed in front of Officer Galvin and crossed the street and passed in front of me, I asked him a question at that time. (T. 215.) Caldwell went back to the car in the rear of the gas station. Galvin and Hazer and I got into the car with Caldwell; we left the station and proceeded to 46th and Michigan, where we left Caldwell out of the car, watched him walk east on 46th to the northwest corner of 46th and Indiana. (T. 216.) Then we proceeded to drive down Michigan to 45th over 45th and Indiana back south on Indiana where we parked in front of approximately 4534 Indiana Avenue. We could see Caldwell standing on the corner at 46th and Indiana. Sometime between five and ten minutes later a man came out of the building, walked down towards Caldwell; Caldwell walked towards him and Hazer and myself were in the car. Galvin had gotten out of the car in front of one of the homes and as we reached about 4554 South Indiana Avenue, we saw Caldwell's right hand and Sears' left hand meet. We got out of the car and placed them under arrest. I then searched Sears and found $50 in currency; Hazer searched Caldwell. (T. 217.) Hazer found a package on Caldwell containing a white substance. We checked our money and the serial numbers on the $50 that I found on Sears recorded with the serial numbers we had recorded on some police paper. We took Sears and Caldwell back to 4534, or 38, I believe it was South Indiana. I took $50 from Mr. Sears. (T. 218.) It was five $10 bills which I had seen at 1121 South State Street November 15, 1952 about 1:00 o'clock in the afternoon. I know it was the same money because we recorded the serial numbers and after the arrest, I compared the serial numbers against the serial numbers on the list that I recorded and found them to be the same. (T. 219.) I saw the package Hazer removed immediately afterwards. There were no tax

stamps on it; I found no United States Treasury order on Sears when I searched him. (T. 220.) I have seen Government's Exhibit 2 before, the first time was November 15, 1952 at 4554 Indiana Avenue; it was in Agent Hazer's possession, I saw it again at 1121 State Street when we initialed it in the narcotics Bureau Office the same day, November 15, 1952. My partner Joseph Galvin, Agent Hazer and I initialed it. I have not seen Exhibit 2 since that time. (T. 221.) Exhibit 1 which is a package alleged to be the serial numbers of 5 $10 bills together with five $10 bills I saw on November 15, 1952 about 1:00 p.m. in the Narcotics Division, 1121 State Street; it was given to Caldwell by Hazer.

I saw it again when I placed Sears under arrest and searched him and found it on his person; I know they are the same ones because we recorded them and signed our names underneath them. (T. 222.) Hazer, Galvin and I recorded them and signed our names, and Exhibit 1 bears our signatures. We were parked at 45th and Indiana somewhere between five and 10 minutes. (T. 223.) I heard a whistle but I could not say for sure who whistled; it came from the building at about 4538 South Indiana. When I first saw Sears, he was in front of the building at 4538 Indiana walking south. I would say it took within 30 seconds or a minute, after we left Caldwell out of the car at 46th and Michigan to drive to 45th and Indiana. (T. 224.) All I testified to happened in Chicago, Cook County, Illinois. (T. 225.)

Whereupon Government's Exhibit 1, the money, was admitted in evidence. (T. 225.)

Cross Examination by Mr. Holman.

The five $10 dollar bills came out of Sears' pockets in front of 4454 Indiana; the number on the yellow sheet of paper were compared previously with the currency. It

took Caldwell about two minutes, I don't know the exact time, maybe a minute, to walk from 46th and Michigan to 46th and Indiana; he was on foot. (T. 226.) I didn't keep track of the time but I figure that about 30 seconds would be about the time it took the car to travel north on Michigan a whole block, going through the light on 45th and Michigan, make a right turn back down 45th Street over to Indiana, after Caldwell had gotten to the corner and had been gone about two minutes. We might have made the light at 45th Street or we might have missed it, I don't remember; it might have been longer than 30 seconds that we took in the car; it might have been a minute, and during that time Caldwell was not under the surveillance of anyone in the car. (T. 227.) We could see him from the corner of 45th and Indiana, there were people on Indiana Avenue, it was 2:00 o'clock in the afternoon; people were going up and down Indiana Avenue on that side of the street; I think it was a fairly nice day. It wasn't warm, it was cold enough for a top coat; I don't recall the temperature. (T. 228.) I think 60 degrees is a little warm for a top coat; I am pretty sure he was wearing a topcoat. As to the United States Government's weather report showing that it was 60 to 62 that afternoon, I will repeat that it was a fairly nice day, looking at the weather report's 60 to 62 between 1:00 and 2:00 P.M. (T. 229. I was wearing a topcoat I believe.

The whistle came from the direction of the building and from the direction it came there were houses all up and down. I initialed the little brown package that came from Caldwell's pocket. I was before Judge Wendell E. Green in the State Court on Monday, May 25, 1953. I had the money over there. (T. 230.) I didn't have the money, Agent Hazer had it, I believe. He had the money and the paper; it is a long time ago since

May 25, 1953. I recall testifying before Judge Green May 25, 1953 in the Criminal Court of Cook County. (T. 231.) I don't recall offhand every question and answer; if it is in the record, I will say yes I was asked by the State's Attorney if I had the serial numbers of the bills and I testified that, yes I did; Federal Reserve Notes. I must have had them if I swore under oath that I did. (T. 232.) There was a full trial over there; the case was not thrown out before Mr. Hazer got there; he had to bring the exhibits with him because they were all turned over to him. There were witnesses present over there; there were some stipulation in the trial; some evidence was missing; what it was I am not sure. The money was there I know that; it was the only Exhibit I recall seeing there or having anything to do with. (T. 233.) I was the only police officer who testified; I recall Judge Green saying to Attorney Clayton that the police officer was there and that I said, "Right here."

Judge Green said that there was some statement made that I had misplaced or lost the narcotics and I said, "I did not, but the Government agent did." I recall those statements; I was the only officer who testified over there. (T. 234.) I don't know if the Government Exhibits were lost way back in May but they weren't in Court. That was at the trial of the same defendant, Otis Sears, in the State Court where he was discharged. Caldwell was in the record shop, I would say five minutes, it could have been ten. I didn't keep any time during that five to ten minutes; I didn't see who he talked with. I didn't see whether anyone handed him any article. (T. 235.) And when he was standing on the corner with the weather 60 to 62 degrees, at 46th and Indiana, and people walking to and fro and I was driving north on Michigan, I didn't see whether or not

he talked with anybody along that place. I couldn't see him talk as I drove north on Michigan. I never did see Caldwell and Sears exchange any articles in front of 4554 Indiana Avenue. Hazer was under the wheel. (T. 236.) We drove north, made the right turn down 45th Street and then made another right turn south on Indiana. And as we drove down Indiana Avenue, 4528 to 30 would be where we finally came to land, practically in that vicinity where Mr. Galvin got out of the car; when he got out, we were up to the curb, parked along the curb and we stayed parked along the curb until just before the arrest, then we pulled the car out and pulled it abreast of the two men. (T. 237).

We were double parked at that time but all other times were single parked. We were single parked adjacent to the curb five to ten minutes before I heard the whistle, I would say it was more than two minutes; more than four minutes and from five to ten minutes. Where Officer Galvin says ten to fifteen minutes, I would say five to ten minutes; it could be up to ten minutes. Caldwell had no billfold or anything like that on him as he left 11th Street; I was the first officer in the actual making of the arrest. (T. 238.) I leaped out of the car and started the arresting machinery, the first officer there. Nobody else was searched at 4554. We went back to 4538 and searched some people there.

Redirect Examination by Mr. Quan.

More than one copy was made of Exhibit 1; I don't know right now what happened to the other copy. (T. 240.) The day of the arrest, I know I had a copy, I believe four or five copies were made; I don't recall what happened to them. (T. 241.)

JOHN W. FONNER:

Direct Examination by Mr. Sodergren.

I reside in Oak Park, Illinois. (T. 243.) I am Chief Chemist of the Alcohol and Tobacco Tax Laboratory, located in the Main Post Office Building, Chicago, Illinois. (Mr. Fonner gave his background and experience. T. 244-245.)

I have seen Government's Exhibit 3 before. It was delivered to me in the laboratory November 18, 1952; I placed it under a time stamp and gave it a laboratory number. I took it in the laboratory, broke the seal and extracted Exhibit 3-C therefrom and gave it the same number. I weighed it and found it contained 58½ grains and analyzed it; after analysis it had 57.4 grains; I sealed Exhibit 3-C and placed it in Exhibit 3-A, sealed 3-A and gave it the same laboratory number, 31931, and on the back of it I dated it November 18. It was received, analyzed and sealed November 18, 1952. (Tr. 246.)

After analysis, it was placed in the vault. The last time I saw Exhibit 3-A sealed was September 16, 1955; it was in Court several days and was brought back by Agent Christianson on the 21st of September; it was re-sealed at that time and Government's Exhibit 3-C was placed in Exhibit 3-B. The last time I saw Government's Exhibit 3-B was December 19 when it was given to Agent Christopher and he brought it here to Court and it is here today. (T. 247.) Government's Exhibits 3, 3-A and 3-B could not be opened without, in any instance, without ruining the envelope. 3-C could not be obtained from any of those Exhibits without opening the envelope; without defacing it. (T. 248.) If I were handed a white substance, any powdery substance, from my experience I would be able to take that to the laboratory and determine whether or not it had narcotic

properties. I received Exhibit 3 on November 18, 1952 from Narcotics Agent Hazer and Government's Exhibit 3-C, I neglected to testify, contained heroin. (T. 249.) Government's Exhibit 3-C contained 58.5 grains in this Exhibit 3-C when received; and there was 57.5 grains left after analysis; this was not pure heroin, it was heroin which had been adulterated. I have made thousands and thousands of these analyses. (T. 250.) They were similar to the analysis involving this substance. (T. 251.)

Cross Examination by Mr. Holman.

I have been with the United States Government since October 1, 1919, and I have made chemical analyses; I ran my first narcotics in 1920 when I came to Chicago. * * * (T. 252.)

(The witness then detailed the mechanical manner by which he makes a chemical analysis. (T. 253-258.)

Exhibit 3-C has initials on it, including mine and another chemist's in the laboratory, John Daniel Endriz; the writings just above the figures 11-18-52 are those of narcotics agents. I received this on the 18th, I know by the time stamp. It was in this container, sealed with scotch tape. There is no scotch tape when I received, it was a sealed envelope and it was not opened. Exhibit 3 of December 19 was inside this one. (T. 259.) The powdery substance was in the envelope marked 3; and it was already sealed when it was handed to me. I got the substance out of it by taking a shears and making an opening, then I put the substance in it; then I extracted this substance from it. Then I made the test. (T. 260.) Exhibit 3 was opened and remained opened after I extracted the substance from it; it remained in the laboratory until it was used in Court the first time in 1955; 3 was the Exhibit that was opened;

3 had been opened and was not sealed any more. (T. 261.)

The substance is then placed in another envelope and that envelope is sealed and it was sealed the same day it was opened in Court. I sealed it. It was opened in Court September 16, 1955. Then it was placed in 3-B; that made two envelopes that were opened and then 3-B was opened in Court December 19, day before yesterday; I was not in Court September 16. (T. 262.) When Exhibit 2-A was opened in Court on September 16 and the substance was extracted from it, at the conclusion of the hearing, the substance was put in another envelope, marked 3-B of December 19, sealed September 21. Those are my initials and the initials of the other chemist; the substance that was brought to me in the third envelope; 3-B, the one which was opened December 19 is the substance that was brought to me originally in Exhibit 3. (T. 263.) To tell how I know that the substance that was originally taken out of 3-B and first seen by me on November 18, 1952, is the one that ultimately came out of 3-B day before yesterday, I will say that in this particular instance I think there is no question, here are the staples which were placed on it November 18, 1952 and there have been no other staples placed on there; there are no holes there except those particular staples.

The only other time that this was not in my possession is when it was in Court and that was in 1955 in September. (T. 264.) Looking at what appears to be perforation holes, those were the original holes. I think I can clear this up. (T. 265.) The Exhibit is not all in one piece, it has been folded back at the top, it is not one continuous piece of glassine paper. I am speaking about Exhibit 3-C, it has been folded at the top. It came out of the first of the three envelopes and was later found in the third of the three envelopes. I didn't say

that I know this to be the same envelope because it shows three staples on it; I didn't say it that way; I wasn't asked that question. (T. 267-268.) Exhibit 3-C is the same exhibit that came out first of the first package and was later in the third package because there have been no changes since these last staples were put in. When the samples came in they were stapled; you can see the staples; this has been bent over since then, and after the analysis staples were placed on by me. There is no third set of staples; if you take a look in the envelope, you can't see it coming through, it is not coming through. If it did come through, then I couldn't make the statement which I have made; in other words, I couldn't say no other staples have been put in, but in this instance there is only the staples, and they only show on one side; they don't show clear through here. (T. 268.) It is folded where they do show, but they would have to be three sets of staples in any event after it had been opened.

I would say it has not been opened; I know that from what I have been explaining and this is independent of the fact that there is another set of staple marks on it. I say that there was another set of staples when I received it; that had to make two. It was stapled when I first saw it, and I unstapled it to analyze it. I stapled it again when the analysis was finished, that made two sets. Just the other chemist has access to the vault. (T. 269.) If an agent brings a substance in to be analyzed and both of us are busy, then the chemist's initials would not be on it. If I am not there, my initials would not be on it. Sometimes it is left in the office and brought to my attention later but not in this case. In some instances that is done. In those other instances, I do not put my initials on where the time is stamped. But before analysis in all instances, I inspect to see whether

the envelope has been opened. Of the one hundred thousand chemical analyses I have made, I don't remember this one individually and specifically by itself. (T. 270.) I only remember by a system of recording and keeping things. I can't answer the question as to whether or not if the system should break down, then the assumption that I am now giving might be different.

There are no markings on these exhibits to show that they were released to anyone for use in the State Court in May of 1953. (T. 271.) If Agent Hazer says he took them to the State Court May 1953 and got there too late for the trial, I would say that these samples have been in Court various times, including the time they were in Federal Court, but at no time were they opened when they went to Court; they were brought back still sealed, I have a record of every time they left the laboratory. (T. 271-272.) The record is not on these exhibits because there was no change made in those exhibits. On May 7, 1953 it was taken to Court; I don't know whose Court, it just shows it was there. (T. 273.) Another date shown is May 13. It was taken from my possession on May 13. On May 7th, it was out of my custody, six days. Agent Hazer had possession of it; it shows he took it out; it shows brought back on the 13th. (T. 274.) Other than that, it was in Court on the 21st of January, 1953. As near as I can figure out these initials, it was Agent Hazer. Next was the 18th of February, next was June 1955, returned the same day. Next July of 1955, and July 1, returned the same day, then October 7, returned the same day—1955. Oh, before that it was in Court, that was when this change was made up on the 16th. My record does not show where it went when it left my office. (T. 275.) My records don't show it out on May 25, 1953; going to the

State Court; I don't have any record of May 25. It is possible for Agent Hazer to have gotten it from the other chemist and I would not know about it. (T. 276.)

Redirect Examination by Mr. Sodergren.

The exhibit was last seen sealed by me on September 16, 1955. That was the last time I sealed it. Now, sometime after that up until the 21st, it was opened in Court; between that date it was in Federal Court. (T. 278.) The envelope marked Government's Exhibit 3-A remained sealed from November 18, 1952 until September 16, 1955.

Recross Examination by Mr. Holman.

I handle as high as two dozen envelopes a day but most generally it would be one or two a day; 25 or 30 a month. I loan out on an average of less than one a day, 15 or 20 a month. I am in the process of giving them to agents and taking them from agents and that cross process daily. (T. 280.) Sometimes there would be one in and one out and sometimes more than one; sometimes none, and that activity of my office goes right along with my chemical analysis of substances. When an agent gives me an envelope like that 25 or 30 times a month or more and cross exchanges, he brings one in takes one out, if I am there I examine every one of them to see whether they are sealed when they come back. (T. 281.) In answer to a court question he said: "Whatever the substance was in the original glassine envelope that Agent Hazer gave me and I examined, that is what I talked about in my testimony today." (T. 282.)

RAYMOND F. CHRISTOPHER:

Direct Examination by Mr. Quan.

My name is Raymond F. Christopher; I reside in Chicago, Illinois; I am a Narcotics Agent attached to

the United States Treasury Department Bureau of Narcotics about 17 years. I have seen Exhbits 3 and 3-A before. I brought them to Court on September 16, 1955. (T. 283.) I got 3 and 3-A from the United States Chemist's lab on the Seventh Floor, U. S. Post Office, Chicago, Illinois. I brought them to Judge Perry's Court Room here. 3-A was sealed, 3 was opened. I have seen Government's Exhibit 3-C before; in the Court Room here on September 16, 1955 when I brought it to Court. I gave it to the United States Attorney, Mr. Emanuelson, and it was opened in Court. (T. 284.) After they were through in Court I would take it and put it back in the vault or I returned it to the chemist each time. I took it back to the office and put it in the vault after each time in Court, and then on the 21st of September, 1955, after they were finished with it in Court, I took it to the chemist and in the opened condition; I am referring to this Exhibit 3-A which had been opened in Court and 3-C was in there after the Court had finished with it and I returned it to the chemist on September 21, 1955, with Government's Exhibits 3, 3-A and 3-C; and on December 19, 1956 I brought Government's Exhibit 3-B in a sealed condition to the Courtroom here; I obtained that 3-B from the U. S. Chemists, Mr. Endriz and Mr. Fonner in the New Post Office, Chicago, Illinois, Seventh Floor. (T. 285.) I had custody of Exhibits 3, 3-A and 3-C from September 16, 1955 to September 21, 1955 other than the times they were before His Honor. (T. 286.)

Cross Examination by Mr. Holman.

I physically put them in the vault; I went to the supervisor, Mr. Aman and asked him to open the vault; he opened the little vault and I placed them in the vault. The next morning I came out and I would go in the vault with Mr. Aman and he would open the little vault

and remove it and hand it to me. Mr. Fonner would be downstairs. I didn't turn it back to the Chemist until it was finished in Court here on the 21st. The vault is an office vault and is not in the chemist's room. We have a big vault and a small safe; Mr. Aman opened up the small safe. (T. 286.) Since it was a narcotics safe, that is where he inserted it. He had the combination; that is the vault I am talking about that I put it in; it was not under Mr. Fonner's control at all from September 16, 1955 until September 21, 1955. When we are using it in evidence, the chemist closes about 4:30 and if I can possbly make it to the chemist before he closes, I do, otherwise I take it to the office and put in the vault; the chemist is on the seventh floor, we are on the Eighth Floor; the vault is in our office on the Eighth Floor. (T. 287.) It is kept in our office after the chemist closes or goes home; if I am in court late, I put it in our office. I don't know what happened back in May. (T. 288.)

(Argument of counsel. T. 288-296.)

Government's Exhbits 1, 2, 3, 3-A, 3-B and 3-C received in evidence, over defendant's objections. (T. 296.)

JAMES CALDWELL, recalled as witness for Government, was represented by counsel who refused to permit him to testify. (T. 297-313.)

(Government rested. Motion for judgment of acquittal. T. 315.)

(Argument of counsels on motion for judgment of acquittal. T. 315-326.)

(Motion denied. T. 326.)

WITNESSES FOR DEFENDANT:

LEO R. NEWMAN:

Direct Examination by Mr. Holman.

His name was Leo R. Newman; he lived at 5905 North Kilbourn, Chicago. It was stipulated as follows (T. 326):

On the witness stand is L. R. Newman, if the Court please, 5905 North Kilbourn, Chicago, and he is a commercial photographer. If he were to testify he would testify that he made the photos and developed them, of Defendant's Exhibits 1 to 10 inclusive and Defendant's Exhibits 1-A to 10-A inclus... for identification.

(Said photographs were marked respectively, Defendant's Exhibits 1 to 10 inclusive and Defendant's Exhibits 1-A to 10-A inclusive, for identification.)

Mr. Holman: Exhibit 1-A shows the alley east of Michigan on 47th Street, taken on 12-18-56, at 3:00 p.m., with an 8¼ inch lens, from the alley east, and depicts in bold figures "118 East 47th Street", and next door to it would be 120.

Mr. Quan: Taken approximately 3:00 p.m. in the afternoon? (T. 327.)

Mr. Holman: Yes, 3:00 p. m., in the afternoon.

Exhibit 2-A, if the Court please, shows the northeast corner of 47th and Michigan and is taken in conjunction with 1-A, because 1-A begins at the alley, 118, and goes east, and Exhibit 2-A then shows from the corner down to the alley. And it was taken at about the same time, on the same day, with a 10-inch lens.

Exhibit 3-A is the gas station itself, on the southwest corner of 47th Street and Michigan Avenue, taken December 19, 1956, at 8:00 a.m., and with the exception of the ones that are mentioned with an 8¼-inch lens, the others are 10-inch lens.

The Witness: 12-inch lens.

Mr. Holman: 12-inch lens. (T. 328.)

Exhibit 4-A, if the Court please, was taken from the southeast corner of 47th and Michigan, and it depicts the northeast corner of 46th and Indiana. It was taken on the ground, on December 19th, shortly after the others were made, and it was taken while the photographer was standing on the ground.

Exhibit 5-A, if the Court please, is the identical same portrait as 4-A but it was taken while the photographer was in an automobile.

Exhibit 6-A, if the Court please, was taken from 45th Street just as the automobile—just as the photographer was rounding the corner from 45th and going into Indiana, and it is looking south on the west side of Indiana Avenue.

Defendant's Exhibit 7-A is a scene in front of 4528 Indiana Avenue. The camera was behind the wheel of the photographer's car when this photo was made, and the camera was held at a position a little lower than the mirror in the car, and he was double-parked. (T. 329.)

Defendant's Exhibit 8-A is the same as Exhibit 7-A, shows the same scene, but it was taken while the car was at the curb as distinguished from double-parked.

Defendant's Exhibit 9-A shows the scene in front of 4528 Indiana Avenue, the group of buildings to the right and left of 4528, and it was taken with an 8½-inch lens.

Defendant's Exhibit 10-A, if the Court please, shows the whole of Indiana Avenue from 45th Street, which is on the right of the photo as you look at it, with 46th Street on the left of the photo as you look at it. It was taken at 4:10 p.m., December 18, 1956, and it shows that whole block of Indiana Avenue on that side of the street.

By stipulation these are admitted as Defendant's Exhibits 1 to 10 and 1-A to 10-A. Am I right, Mr. Quan?

Mr. Quan: That is right, counsel. For what they are worth we have no objection. (T. 330.)

The Court: Admitted:

(Said photographs, so offered and received in evidence were marked respectively, Defendant's Exhibits 1 to 10 and Defendant's Exhibits 1-A to 10-A, inclusive.)

Mr. Holman: All right.

(Witness excused.)

WILLIAM CORBIN:

Direct Examination by Mr. Holman.

My name is William Corbin; I live at 211 East 48th Street; I am acquainted with the defendant, Otis Sears. (T. 333.) I have known him about sixteen years; he is a good friend of mine. I saw Otis Sears November 15, 1952; on that particular day, south at 4544 Indiana Avenue in the front room playing whist. In the room was Wendell Turner, Harry Peoples, Otis Sears and myself; we were in the front room on the Indiana side. (T. 334.) Otis Sears got a telephone call and told us that he would be back in a few minutes; he was gone four or five minutes and we looked on the corner out of the window; somebody else in the room saw a policeman hat, which we thought was a police, and put him in a squad car, him and another fellow. They were out on the sidewalk about 10 minutes. Otis Sears had been in the front room on the Indiana Avenue side at the front window playing cards about an hour before I saw a policeman putting him in the squad car. He had been there a whole hour. (T. 335.) With the exception of the time when he walked out and the police grabbed him, he did not leave at any time during that hour he was playing cards. We played cards continuously for an hour. I didn't see Otis any more that day after the arrest.

I have seen him between that day and this day; he talked to me about being a witness. I talked to Attorney Clayton before his death. I talked to you also. The day he got arrested he had been there with me playing cards for a solid hour before the arrest. (T. 336.)

Cross Examination by Mr. Quan.

In the house there were Wendell Turner, Harry Peoples, myself and Otis Sears. I don't know where Turner is, I haven't seen him in quite a while. I don't know where Peoples is but I know where he hangs around. Sears and I don't play cards very often; that particular day, he happened to be there, but I used to go down there and play cards often at 4544 Indiana Avenue, that is the property of a lady named Matty. (T. 337.) I don't know her last name; we play cards there quite often, practically every other day or so or every week, I wouldn't say as many as 150 times a year but we go there quite often and play, I don't know the landlord's last name. We were in the front room; I don't know whose room that was. There was no bed in the room, just a davenette and television and different things. (T. 338.) The building is a three-flat building, gray stone. We were on the first floor, I don't know how many rooms there are; Matty is the landlady of the first floor building, I don't know who else. I am employed.. (T. 339.) I was employed on November 15, 1952; I was workng at the Edgewater Beach Hotel as a washroom attendant. My present occupation is clerk in the Post Office. I work in the Main Post Office on Van Buren and Canal; I have been working there for six years; I used to see Turner each week, sometimes twice a week; last time I saw him was about a month ago. (T. 340. I saw Mr. Peoples yesterday in a tavern at 231 East 47th Street. I first knew I was going to be a witness right after they

arrested Otis Sears. I talked with him. Sears did not tell me where he had been just prior to the card game.

Redirect Examination by Mr. Holman.

I talked to Sears after he got out on bail. I made no effort to speak with Sears or the police officers on the street at the time; no one else in the house did. After he got out on bail, I talked to him about the occurrence and it has been fresh in my memory ever since. (T. 341-342.)

Recross Examination by Mr. Quan.

There wasn't nothing I could do to help Mr. Sears as I watched him get arrested. (T. 342.) There was nothing I could do to help him; I didn't go outside and talk to the police officers because they put him in a car. Every time I talk to police officers they tell me don't interfere.

(Witness excused.)

OTIS SEARS:

Direct Examination by Mr. Holman.

My name is Otis Sears; I live at 6943 Indiana Avenue. (T. 343.) November 15, 1952, I did not purchase any narcotics of any kind, character or description from any person; on November 15, 1952, I did not sell to James Caldwell or any other person any narcotics of any kind, and particularly I did not sell 60 grains of heroin. On November 15, 1952, in the course of the afternoon, I was at 4544 Indiana, I had been there 45 minutes or an hour before I was arrested. I was playing cards with William Corbin and Wendell and a boy named Harry Peoples; I don't know what Wendell's last name is. (T. 344.) I had been playing cards with them 40, 45 min-

utes; it was the whole time I had been there. My occasion for being over there was, I had been at my record shop at 120 East 47th Street; Wendell called me; I had a hunting coat that belonged to him; he was going hunting the following Sunday morning, and asked me to bring him his coat. I had taken the coat down there; when I got down there the three of them were playing tonk. (T. 345.) It was a card game, they asked me if I wanted to play whist, I said I would play a while. We started playing cards; we had been playing cards 40, 45 minutes and I got a phone call from Laura Johnson, a clerk in the store; she is a clerk in the record shop which I own now. I got this phone call from Miss Johnson who is on my payroll right now, and who was at the time she called. (T. 346.) She called me and told me that James Caldwell was there and said he had some money he wanted to pay me. About a week before that I had loaned James $72 or $73; he had got broke; that is, he lost all the money he had in a dice game he was participating in. (T. 347.) Every once in a while, somebody would give him two or three dollars and he would get back in the game; when the game was over, he was broke; he didn't have any money; he had lost all his money; and then he told me about he owed his rent and his rent was due, and he wasn't intending to lose his money; and asked me would I lend it to him, and he would give it back to me. He said his rent was $70. I let him have $72 to $73, I don't remember exactly, so that he would have a few dollars over his rent. (T. 348.) I saw him maybe once between the time that he lost his money in the game and that Saturday that he was arrested.

Miss Johnson called me and said James was there and had some money he wanted to pay me. I said, "Tell him to give it to you." She in turn says, "He say he

don't want to give it to me"; that he had got it from me and wanted to give it to me. I said, "Tell him I'll be here a few minutes"; she said, he said he was in a hurry. I said, "Tell him I'm figuring to leave now, to meet me on the corner", where Wendell lived because he had been there. (T. 349.) I met James on the corner, he gave me the money; I counted the money; I said there's $50 here. He said I will give you the rest; I am in a hurry now. By that time the police grabbed me. I did not sell to him heroin or any other narcotics; I didn't sell him anything. I didn't pass him anything; I did not have any narcotics in my possession of any kind or character, and particularly, I did not have heroin. I didn't even know what I was arrested for until I was in jail. (T. 350.) The $50 that was taken off me that I got from James Caldwell, that is the same money I have seen here in Court; that is how I happened to come into possession of the money that was given to Caldwell by the police officers; I did not know the police officers had given Caldwell the money; that is the whole of the transaction. (T. 351.)

Cross Examination by Mr. Quan.

I did not whistle when I left the building; didn't know what Caldwell was doing. It didn't take me a minute to count the money Caldwell had given me; I stood there in plain sight and counted the money. (T. 352.) I am the same Otis Sears that was convicted December 2, 1949 for the unlawful purchase and possession of heroin and cocaine, unlawful concealment and transportation of heroin and cocaine after importation (T. 353.)

Redirect Examination by Mr. Holman.

They came into the room and found some empty capsules, traces of narcotics, and that is what I was convicted on. (T. 355.)

Recross Examination by Mr. Quan.

I don't know if I was convicted on three counts; I pleaded guilty. (T. 355.)

Redirect Examination by Mr. Holman.

I pleaded guilty to whatever was in the indictment; I had a lawyer and the lawyer had the indictment. (T. 355.)

(Defendant rested.) Which was all the evidence and exhibits produced at this trial.

OPINION AND FINDING OF THE COURT.

The Court: The Court has heard the testimony. The uncontradicted evidence is that one Caldwell was arrested, and he was searched. He was given some marked money, five $10 bills of marked money.

He was escorted by the police to a certain location where he was released. He went to a record shop. He was under surveillance there. He stayed a while, came out, and then the police escorted him to another point on the street, released him, two of them remained in the car, and he was under surveillance.

The uncontradicted evidence is that the defendant Otis Sears was playng cards with three other men during all of the time at the address near the point where Caldwell was released, and that he received a telephone call, and that after receiving the telephone call he went out.

Now, as to the contents of the telephone call, he states he received the call from a girl who worked in his office, and that Caldwell was there, that he would not give her the money but that he would give it to him, and a meeting was arranged.

He went out and met Caldwell on the street and got the money. (T. 357.)

Then comes contradiction or uncertainty in the evidence. However, the court is conclusively of the opinion that after the evidence which the officers introduced here, showing that they searched Caldwell immediately before releasing him and that he had no narcotics on him immediately prior to being released from custody, and that he had narcotics on him when he was apprehended immediately after he joined hands with Sears, and that Sears had the marked money, which is not contradicted on him, which he said that Caldwell paid him for a debt —that does not impress the court.

The court is of the opinion that the marked money was delivered to Caldwell and the narcotics in question was delivered by the defendant Sears to Caldwell at the same time, and that there was a consummation of a transaction there, and that the defendant is guilty.

The defendant will come forward and we will dispose of the matter. (T. 358.)

The Court: You are committed to the custody of the Attorney General of the United States for a period of five years on the whole indictment, and the sentence is stayed for ten days. (T. 360.)

The Court: A mandatory fine. I don't know anything about the man's financial condition, but—

A fine of $1. Fines are not determinative matters in this type of case. $1 and a sentence of five years together on this case. (T. 361.)

Certificate of Court Reporter that foregoing is a true and accurate transcript, etc. (T. 363.)

JUDGMENT (R. 10)
(entered December 26, 1956)

The appeal is from the following judgment of the court, to-wit: "It is Adjudged that the defendant has been convicted upon his plea of not guilty and a finding of guilty of the offense of Sections 2553(a) and 2554(a), Title 26, United States Code and Section 174, Title 21, United States Code (Unlawful purchase and possession of heroin; unlawful sale and transfer of heroin; fraudulent concealment of heroin after importation) as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) Years and besides that he forfeit and pay to the United States of America a fine in the sum of One Dollar ($1.00) and to stand committed until the fine is paid or until he shall be otherwise discharged by due course of law.

It Is Ordered that execution of sentence be and the same is hereby stayed for 10 days.

It Is Further Ordered that the Government's motion to increase the defendant's bond to Twenty-Five Thousand Dollars be and the same is hereby denied and that the defendant's present bond shall stand for 10 days.

It Is Further Ordered that the defendant's motion for a new trial be and the same is hereby set for hearing on January 11, 1957 at 2:30 P.M.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

(signed) J. S. Perry
United States District Judge." R 10.

Defendant's original bond to stand until January 11, 1957, and execution of sentence stayed thereto. R 11

Defendant's motions (1) to vacate the finding and judgment; (2) for a judgment of acquittal; and (3) for a new trial filed January 9, 1957. R 13-15.

Government's opposition to said motion filed January 10, 1957. R-16-17

NOTICE OF APPEAL (R. 19)
(filed January 21, 1957)

"The defendant, Otis Sears, was on the 26th day of December 1956, found guilty of having in his possession a narcotic not in the original stamped package, nor from said package; and the sale of narcotics not in pursuance of a written order on forms issued for that purpose. The trial was by the Court without a jury. Judgment was entered upon the finding of guilty and the defendant was, on said date, committed to the custody of the Attorney General for a period of five (5) years and fined $1. No costs were imposed. Motion for new trial was denied on January 11th, 1957, and defendant was released on bond in the sum of $5000.

And the above named appellant, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the above stated finding of guilty and Judgment on said finding.

Dated: January 19, 1957." (R. 19)

On defendant's motion, time for filing and docketing record on appeal extended to and including April 20, 1957. R 24

Stipulation filed specifying papers to be used in the record on appeal, to wit: R 25-26

"1. Indictment filed July 3, 1953.

2. Defendant's pleas of not guilty entered October 30, 1953.

3. Jury waiver executed December 18, 1956.

4. Motion filed December 21, 1956 for defendant's discharge, and denial thereof.

5. All orders entered December 26, 1956, showing evidence concluded; showing the Court finding the defendant guilty; showing the sentence of the Court; showing Stay of Execution; showing Government's motion to increase bond and the denial thereof; showing defendant's bond allowed to stand ten (10) days; and showing defendant's motion for new trial set for hearing January 11, 1957, at 2:30 o'clock P.M.

6. Judgment of Court entered December 26, 1956. R. 25

7. All orders entered December 27, 1956.

8. Motion January 9, 1957 and Government's reply to said motion filed January 10, 1957.

9. All orders filed January 11, 1957, showing hearing on defendant's motion for new trial and denial thereof; motion for Government to increase defendant's bond to $25,000.00 and the denial thereof; and showing a fixing of the appeal bond at $5000.00.

10. Filing of Appeal Bond January 11, 1957.

11. Notice of Appeal filed January 21, 1957.

12. The transcript of testimony filed herein.

13. Defendant's Exhibits 1-A to 10-A inclusive filed herein.

14. Copy or description of Government's exhibits.
15. This stipulation.
16. All documents filed hereafter herein.
17. All orders entered hereafter herein." R. 26

Description of government's exhibits; to-wit, R 28-29

"The following description of the Government's Exhibits in the captioned proceeding are filed herein for the Clerk of the District Court to transmit to the Clerk of the United States Court of Appeals as part of the Record on Appeal pursuant to number 14 of the Stipulation entered into by the respective parties herein on April 16, 1957:

Government's Exhibit Number 1:

Consists of a piece of yellow paper approximately eight inches by ten inches, bearing the serial number of five $10.00 Federal Reserve Notes; it is dated November 14, 1952, and signed Joseph P. Galvin, Narcotic Section, Chicago Detective Bureau, Theodore Hazer, Narcotic Agent, and Eugene Cassidy, Narcotic Section, Chicago Detective Bureau. This exhibit also includes five $10.00 Federal Reserve Notes bearing the same serial numbers as those on the yellow piece of paper, to wit: G64590941A; G55066888A; G59252275A; G57628516A; and G59144363A. R 28

Government's Exhibit Number 2:

Consists of a brown envelope approximately two inches square, bearing the date November 15, 1952, and the initials J.P.G., T.H., and E.C.

Government's Exhibit Number 3:

Consists of a brown envelope approximately five inches by eight inches, on the outside of which is the date November 18, 1952, and the initials T.H., G.E., and J.E.F., and a broken seal.

Government's Exhibit Number 3A:

Consists of a brown envelope approximately five inches by eight inches, on the outside of which is a broken seal, the initials J.E.F., and the date November 18, 1952.

Government's Exhibit Number 3B:

Consists of a brown envelope approximately five inches by eight inches, on the outside of which are the initials J.E.F., J.A., the date September 21, 1955, and a broken seal.

Government's Exhibit Number 3C:

Consists of a white glassine envelope approximately two inches square, containing a white powdery substance, on the outside of which are the initials T.H., J.A., J.E.F., and G.E., and it bears the date November 18, 1952." R 29

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 626

OTIS SEARS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No.

OTIS SEARS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Otis Sears, petitioner, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on October 2, 1957.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is set forth in full in the Appendix to this petition. It is likewise set forth in full in the certified copy of the record filed in this Court. The judgment of the United States Court of Appeals likewise appears in said certified copy, along with the order deny-

ing the petition for re-hearing. Said opinion has not as yet been reported. The opinion of the United States Court of Appeals for the Seventh Circuit affirmed a judgment entered by the United States District Court for the Northern District of Illinois, Eastern Division.

The District Judge rendered an informal oral opinion which is set forth in full in the Appendix to this petition; and which is likewise found on pages 50 and 51 of the aforesaid certified copy of the United States Court of Appeals' record.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered October 2, 1957. Petition for re-hearing was denied October 31, 1957. The order denying the petition for re-hearing is shown at page 1a of the Appendix to this petition. This petition is filed within 30 days after the denial of the petition for re-hearing.

The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1254(1) and rule 19 Section 1 B of the rules of the Supreme Court of the United States.

QUESTIONS PRESENTED.

1. Whether the Court of Appeals had the power to reject the findings of the trial court which were favorable to the defendant on the question of the alibi, substitute its own judgment therefor in order to rule against the defendant, and still say that a Court of Appeals is bound by the findings of the court below, and all the while it is rejecting those findings of the court below which were favorable to the defendant.

2. Whether or not the Court of Appeals was bound to accept the findings favorable to the defendant on the question of the alibi.

3. Whether or not the evidence in this case was sufficient to sustain a finding of guilty; particularly so where (1), the defendant according to the trial court established an alibi placing him away from the scene where the marked money was gotten rid of; and (2), where an informer has been permitted to leave the presence and view of police officials with opportunity to deal with unknown persons out of the sight and hearing of said police officers.

STATEMENT OF THE CASE.

The indictment in this case was in three counts. The first count alleged that on or about November 15, 1952, in Chicago, Sears unlawfully purchased from unknown persons, and had in his possession, 60 grains of heroin, not in nor from the original stamped package. The second count charged that at the same time and place, Sears unlawfully sold to Caldwell for $50.00, 60 grains of heroin without a written order on forms issued by the Secretary of Treasury. The third count charged that at the same time and place, Sears fraudulently and knowingly received, concealed, bought and facilitated the transportation and concealment after importation of 60 grains of heroin, knowing the same to be unlawfully imported.

The petitioner pleaded not guilty; was tried and found guilty by the Court, and sentenced to five years in custody of the Attorney General and fined $1.00. Appropriate motions for judgment of acquittal, for new trial, and to vacate the judgment were properly made but overruled.

The government's evidence was that one Caldwell was arrested on November 14, 1952 by narcotics officers. Some time later at the police station he was searched (to make him an informer) and found to have nothing on him. He was then given $50.00 in marked money, whereupon he went with the officers to a record shop at 47th Street. He was in the record shop and out of the sight and hearing of the officers for ten minutes or thereabouts. The officers could not and did not know what went on in the record shop. Caldwell returned to the officers, and was searched again and nothing was found on him. The gist of the government's contention is that Caldwell gave Sears the $50.00 in the record shop, although the trial judge found that Sears had successfully established his alibi that he was not then in the record shop.

The officers then took Caldwell in an automobile to 46th and Michigan where he alighted and proceeded a block east to 46th and Indiana. The officers drove around the block and took up a position a few hundred feet away from Caldwell who was standing on the corner. The agents could not and did not know what Caldwell did or with whom he met or dealt while they were driving speedily around the block. After a wait of some fifteen minutes or thereabouts, the officers noticed the defendant, Sears, walking in a normal manner towards Caldwell and Caldwell started walking toward Sears. When they were abreast of each other the hands of the men met for a moment. The officers immediately alighted from the car and arrested them. Caldwell had on him a powdery white substance in a little brown envelope, and Sears had the $50.00 in marked money. Not over thirty minutes could have elapsed from the time Caldwell and the officers left the record shop until the arrest.

The defendant's evidence was that Sears was playing cards in a building at 4544 Indiana Avenue for a period

of about an hour before the arrest. This testimony was corroborated by a witness named Carbin, a postal employee working for the United States Government. The defense evidence further was that Sears' clerk in the record shop telephoned him at the card game and said Caldwell was in the record shop to pay Sears some money. The evidence was that Caldwell owed Sears seventy odd dollars. Sears told the clerk in the record shop to tell Caldwell to leave the money there. Caldwell stated that he would have to give the money to Sears in person. Sears told the clerk to tell Caldwell to meet him, Sears, on the corner. They met on the corner; Caldwell gave Sears $50.00 and said he would pay the balance later but was in a hurry then. Sears was counting the money in plain view as the officers were arresting him. He denied selling Caldwell any narcotics.

In an informal oral opinion, at the conclusion of the case, the trial judge said, among other things:

> "The uncontradicted evidence is that the defendant Otis Sears was playing cards with three other men during all of the time at the address near the point where Caldwell was released, and that he received a telephone call, and that after receiving the telephone call he went out."

The Court of Appeals affirmed the judgment, but in doing so it adopted a most unusual course. The Court of Appeals' opinion started out by citing numerous cases which correctly hold that a court of review cannot try the issues of fact de novo. However, it then promptly proceeds to retry, de novo, the question of the petitioner's alibi. The trial court had found that the petitioner's alibi was established. Instead of accepting this finding of fact, the Court of Appeals proceeded to try the ques-

tion de novo and concluded, de novo, that the defendant had not established his alibi.

In order to convict in the first instance and affirm the conviction on review, it was absolutely necessary to establish that Sears and Caldwell were in communication with each other twice on the day in question. Judge Perry found that they were only together once. Since they were only together once, then petitioner insists that the evidence is insufficient to prove him guilty beyond all reasonable doubt. It seems that the Court of Appeals must have realized this. However, instead of deciding the case on the basis of this contention, which must surely have resulted in the reversal of the conviction, the Court of Appeals proceeded to try the question of the alibi de novo; to find that Sears and Caldwell were together in the record shop (although Judge Perry found to the contrary), and then proceeded to affirm the conviction.

The Court of Appeals rejected the factual finding of the trial judge that Sears, during all the time in question, was playing cards. Then after rejecting this factual finding which was favorable to the defendant, the Court of Appeals proceeded to re-examine the evidence touching an alibi; to re-weigh the evidence; and to conclude that Sears' evidence fell far short of sustaining the alibi.

In doing this, the Court of Appeals went exactly contrary to the very first paragraph of its opinion which emphasized the legal proposition that issues of fact are not triable de novo by the Court of Appeals. The Court of Appeals says that it may not try an issue of fact de novo; yet it then promptly proceeds to do that very thing. But it is on a fact which was favorable to the defendant and which the defendant claims proves his innocence.

REASONS FOR GRANTING THE WRIT.

Certiorari is prayed for on two basic grounds, each of which will be fully developed hereinafter; towit:

1. A Court of Appeals has decided an important question of federal law which has not heretofore been settled by the Supreme Court and which should now be settled by this court.

2. The Court of Appeals has so far departed from accepted and usual judicial proceedings as to call for an exercise of this court's power of supervision.

I

A Court of Appeals has decided an important question of federal law which has not heretofore been settled by the Supreme Court and which should now be settled by this Court.

This is a case of first impression. Diligent research has failed to unearth any single case where a United States Court of Appeals has stated the law to be one way, and yet in the very self same opinion has proceeded to apply the law in a different way. Because painstaking research has failed to unearth such a case, we are unable to cite any authority for our contention. However, we earnestly contend that logic and reason sustain us.

As already stated, the opinion of the Circuit Court of Appeals cites case after case which supports the general rule that issues of fact may not be tried de novo in the reviewing court. The reviewing court must accept the findings of fact as enunciated by the lower court where there is any evidence to support them. The only thing that a reviewing court can do after accepting the lower court's facts, is to determine as a matter of law whether or not reasonable minds might differ as to whether in-

ferences other than guilt can be drawn from the evidence; and if all reasonable minds must be in agreement that reasonable hypotheses other than guilt can be drawn from the evidence, then the evidence is insufficient to support a judgment of guilty.

In the case at bar, the government would have to show that the informer, Caldwell, got rid of the marked $50.00 in the record shop by giving it to Sears there. This is a truism, because the agents swear that they searched Caldwell when he came out of the record shop and he did not have the marked money on him. Next, the government must prove that when Sears and Caldwell met on the corner of 46th and Indiana, Sears passed the narcotics to Caldwell. In regard to the first item, Judge Perry found that during all the time in question, Sears was on Indiana Avenue playing cards. This then is where the paradox comes in. Faced with this situation, the Court of Appeals must either dispose of the case by recognizing the fact as Judge Perry found it, that Sears was not in the record shop and therefore could not possibly have been the person to whom Caldwell gave the marked money; or it must reject the alibi. Surely, in such a situation, if Caldwell gave the marked money to some person other than Sears, then all reasonable minds would conclude that an inference other than guilt could be drawn from the evidence. It could reasonably be inferred, or rather it would have to be inferred, that Caldwell trafficked with some unknown person in the record shop and that this unknown person could easily have given him the narcotics. But here again a paradox exists; for Sears openly admits that he obtained the money from Caldwell when they met FOR THE FIRST TIME on 46th and Indiana at the conclusion of the hour long card game. Paradox number 3 appears when we try to reconcile

Judge Perry's finding that Sears, all the while, was playing cards on Indiana Avenue, with the evidence of the officers that Caldwell was searched when he left the record shop and did not have the money on him; that is, when we accept the fact that Sears and Caldwell met only once, then we ask who got the money in the record shop? Or should we go to paradox number 4, and reconcile the situation presented by saying that the search of Caldwell when he left the record shop was so superficial that it failed to reveal the marked money still hidden on him. If that be the fact, then such a superficial search would surely have failed to reveal hidden narcotics.

Instead of analyzing the evidence in the light of the above, and basing a decision thereon, the Court of Appeals proceeded to decide as a matter of federal law that it could accept those findings which pointed to the guilt of the defendant; and further decided as a matter of federal law that it could not re-examine the factual issues adverse to the defendant; and finally decided, as a matter of federal law that it could re-examine and re-weigh the evidence bearing on a factual matter favorable to the defendant and come to a wholly different conclusion than that reached in the trial court. That is, where the trial court's factual finding was favorable to the defendant, the Court of Appeals decided as a matter of federal law that it could re-weigh the evidence and accept as a fact a different conclusion unfavorable to the defendant. True, the court did not say this in so many words, but the inescapable conclusion is there nonetheless.

Defendant, Sears, urged the Court of Appeals in his petition for re-hearing to re-examine the case in the light of the fact that the Court of Appeals was bound to accept the alibi because Judge Perry accepted it. But

the Court of Appeals ignored the defendant's request and based its decision on the fact which it alone found that Sears' evidence fell short of sustaining his alibi.

II.

The Court of Appeals has so far departed from accepted and usual judicial proceedings as to call for an exercise of this court's power of supervision.

The accepted and usual judicial proceeding in a situation such as is here presented, is to accept all findings of fact as they come from the trial court, and this includes those facts both favorable to a litigant and unfavorable to him. The accepted and usual judicial proceeding then is to render an opinion and decision in accordance therewith. If the facts are such that, when ALL are considered and evaluated, reasonable minds are in agreement that reasonable hypotheses of innocence can be drawn therefrom then the reviewing court should reverse a judgment of conviction.

In the case at bar the defendant has not had the benefit of the judgment of the Court of Appeals based on Judge Perry's factual finding that all the while, Sears was playing cards on Indiana Avenue.

He is entitled to an examination of his case with that fact accepted by the Court of Appeals, and is entitled to a decision thereon. Because the Court of Appeals has so far departed from accepted and usual judicial proceedings, he has been deprived of a judgment in accordance with accepted federal law and accepted judicial proceedings. He should be speedily given that hearing; and therefore he prays that this Honorable Court will grant certiorari and render such decision as to the Court may seem meet.

CONCLUSION.

Because of the above, petitioner earnestly prays that the writ be granted.

Respectfully submitted,

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APPENDIX.

OPINION AND FINDING OF THE DISTRICT COURT

The Court: The Court has heard the testimony. The uncontradicted evidence is that one Caldwell was arrested, and he was searched. He was given some marked money, five $10 bills of marked money.

He was escorted by the police to a certain location where he was released. He went to a record shop. He was under surveillance there. He stayed a while, came out, and then the police escorted him to another point on the street, released him, two of them remained in the car, and he was under surveillance.

The uncontradicted evidence is that the defendant Otis Sears was playing cards with three other men during all of the time at the address near the point where Caldwell was released, and that he received a telephone call, and that after receiving the telephone call he went out.

Now, as to the contents of the telephone call, he states he received the call from a girl who worked in his office, and that Caldwell was there, that he would not give her the money but that he would give it to him, and a meeting was arranged.

He went out and met Caldwell on the street and got the money. (T. 357.)

Then comes contradiction or uncertainty in the evidence. However, the court is conclusively of the opinion that after the evidence which the officers introduced here, showing that they searched Caldwell immediately before releasing him and that he had no narcotics on him immediately prior to being released from custody, and that he had narcotics on him when he was apprehended immediately after he joined hands with Sears, and that

Sears had the marked money, which is not contradicted on him, which he said that Caldwell paid him for a debt —that does not impress the court.

The court is of the opinion that the marked money was delivered to Caldwell and the narcotics in question was delivered by the defendant Sears to Caldwell at the same time, and that there was a consummation of a transaction there, and that the defendant is guilty.

The defendant will come forward and we will dispose of the matter. (T. 358.)

The Court: You are committed to the custody of the Attorney General of the United States for a period of five years on the whole indictment, and the sentence is stayed for ten days. (T. 360.)

The Court: A mandatory fine. I don't know anything about the man's financial condition, but—

A fine of $1. Fines are not determinative matters in this type of case. $1 and a sentence of five years together on this case. (T. 361.)

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 12019 September Term and Session, 1957

United States of America,
Plaintiff-Appellee,
v.
Otis Sears,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

October 2, 1957

Before Major, Lindley and Hastings, Circuit Judges.

Lindley, Circuit Judge. Defendant, having been found guilty of violation of the Federal narcotic laws in a trial by the District Judge, appeals from the conviction, urging that the record does not disclose substantial evidence to support the finding of guilt. Obviously, any attempt to determine such a question requires consideration of the evidence and a test of the credibility of the witnesses. With the latter we have nothing to do. Our only function is to determine whether the evidence most favorable to the finding adequately sustains it. *United States* v. *Marachowsky*, 201 F. 2d 518 (CA-7), cert. den., 345 U.S. 965; *United States* v. *Detente*, 199 F. 2d 286, 288 (CA-7); *United States* v. *Poppa*, 190 F. 2d 112, 114 (CA-7); *United States* v. *Chiarelli*, 192 F. 2d 528, 530 (CA-7); *United States* v. *Kadison*, 145 F. 2d 525, 526 (CA-7); *United States* v. *Feinberg*, 123 F. 2d 425, 426 (CA-7). We cannot try the issues of fact *de novo*, and we cannot set aside the trial court's finding, unless we can say, as a

matter of law, that the evidence most favorable to it is wholly insufficient to support a verdict of guilty beyond all reasonable doubt. *United States* v. *Holsman*, 238 F. 2d 141, 142 (CA-7); *United States* v. *Owen*, 231 F. 2d 831, 832 (CA-7); *United States* v. *New York Great A. & P. Tea Co.*, 173 F. 2d 79, 81 (CA-7).

Under the trial court's finding, one Caldwell, being in the custody of the United States narcotic agents, having been searched, was given $50.00 in marked currency bills; later, the officers, after Caldwell had made a telephone call, proceeded with him to defendant's shop. While the officers waited outside, Caldwell entered the building, returning to and rejoining the officers shortly later. He was again searched; the bills were no longer in his possession, and no narcotics were found on his person. The officers then proceeded to another point near at hand where they observed defendant Sears meet Caldwell, who had proceeded alone, and pass to him, from hand to hand, an object. They immediately arrested Sears, and found in his possession the bills they had given Caldwell, and, on Caldwell, narcotics contained in a brown envelope. Upon these findings, the court found Sears guilty.

The facts mentioned by the court were amply proved by the Government's evidence. The only reasonable conclusion from the record is that Caldwell purchased narcotics from Sears; that the drugs bore no stamp and were accompanied by no treasury order. Though defendant admitted that he received the marked money from Caldwell, he asserted that it was handed to him in payment of a loan from him to Caldwell. He attempted to prove an alibi, but the evidence fell far short of sustaining it, for his witness in that behalf stated that while he was playing cards with Sears, the latter left the place and was gone for a short time, and that the next time the witness saw him he was in the custody of the arresting officers. We find no inconsistency or discrepancy of any consequence in the testimony of any of the Government witnesses. Moreover, whether they were telling the truth was a question solely for the trial court. Their demeanor, the reasonableness of

their stories, and all other circumstances bearing upon their credibility were within the exclusive scope of the trial court's functions. We cannot say the evidence did not justify the judgment. *United States* v. *Owen*, 231 F. 2d 831 (CA-7).

Defendant insists that the narcotic evidence was mislaid. We find no basis for the argument, but, even if the exhibit had been lost, the undisputed testimony is that the product seized was analyzed by the chemist who found it to be heroin. However, the evidence discloses that the exhibit was never mislaid or lost. Agent Hazer took the envelope with its contents, dated it, initialled it, locked it in his drawer at the Bureau of Narcotics, where it remained until three days later, November 18, 1952, when he placed it in another envelope and submitted it to the chemist, who broke the seal on the envelope, removed the contents, weighed and analyzed it, and found the substance to be heroin. The chemist then resealed the exhibit in the envelope. Though he did not carry it with him, he testified that the envelope could not have been opened without breaking the seal, and that, when it was taken to court by Agent Christopher, it was still sealed. The latter testified that from the time the chemist gave him the exhibit, it remained in his possession, until September 21, 1955. At that time, the trial having been postponed, he returned it to the chemist who, on the same day, resealed it in another envelope, which was returned sealed to the court on December 19, 1956, and opened in court during the trial, when the narcotics were removed therefrom. The evidence is clear that the envelope was traced from the time it was received by the officers and preserved intact until the trial.

Defendant argues that photographs of the various scenes in the locality where the events in evidence occurred are inconsistent with the testimony of the Government's witnesses. However, the record discloses that these photographs were taken during the Christmas holiday season when the streets were crowded, and that they were murky

and blurred. We cannot say that the court was not entirely justified in giving to them only such credence and weight as it believed they were entitled to.

Defendant insists that the trial court should not have permitted the finding to stand because it is founded on the testimony of the informer Caldwell. However, this witness testified merely to the fact that he was given the marked money by the agents; when asked to give details of what occurred later, he refused to answer on the ground that to do so would incriminate him. Consequently, there is no basis in fact for claiming that the defendant was convicted upon the testimony of an informer.

Defendant complains because there is no proof that defendant's fingerprints were found on the envelope containing the heroin. The record is undisputed that the envelope was submitted to a fingerprint expert who is now deceased, that what he discovered was solely within his own undisclosed knowledge, and that there was no record of his findings.

Defendant argues that there are various discrepancies in the trial court's findings. However, though the trial judge made oral findings at the conclusion of the trial, his essential findings are fully supported by the evidence.

It is argued that the Government failed to prove that the narcotics did not come from a stamped package. The evidence shows, without dispute, that no tax stamps were on the package taken from Caldwell. Section 2553(a), Title 26, United States Code, upon which Count I of the indictment was founded, provides that the absence of appropriate tax stamps shall be *prima facie* evidence of a violation and the courts rightly have uniformly followed the express provisions of the statute. *Beland* v. *United States*, 100 F. 2d 289 (CA-5), cert. den., 306 U.S. 636; *United States* v. *Pisano*, 193 F. 2d 355 (CA-7).

Defendant asserts further that the Government was bound to prove that there was no Treasury order. How-

ever, none was found, and, in such case, the presumption that none existed controls until the contrary is shown. *Chin Gum* v. *United States*, 149 F. 2 575, 577 (CA-1).

As we are unable to say, as a matter of law, that the evidence does not sustain the verdict, and as we find no error in the trial, the judgment is affirmed.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Wednesday, October 2, 1957

Before
Hon. J. Earl Major, Circuit Judge
Hon. Walter C. Lindley, Circuit Judge
Hon. John S. Hastings, Circuit Judge

United States of America, Plaintiff-Appellee, vs. Otis Sears, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

12019

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Thursday, October 31, 1957.

Before
Hon. J. Earl Major, Circuit Judge
Hon. Walter C. Lindley, Circuit Judge
Hon. John S. Hastings, Circuit Judge

United States of America, Plaintiff-Appellee, vs. Otis Sears, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

12019

It is ordered by the court that the petition for a rehearing of this cause be, and the same is hereby, denied.

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No. 626

In the Supreme Court of the United States

OCTOBER TERM, 1957

OTIS SHARP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 626

OTIS SEARS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (Pet. 3a–7a) is reported at 248 F. 2d 377.

JURISDICTION

The judgment of the Court of Appeals (Pet. 7a) was entered on October 2, 1957, and a petition for rehearing was denied on October 31, 1957 (Pet. 8a). The petition for a writ of certiorari was filed on November 25, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the Court of Appeals, in holding that petitioner's narcotics conviction was supported by

sufficient evidence, substituted its own findings of fact for those of the trier-of-fact.

STATEMENT

On July 3, 1953, a three-count indictment was filed against petitioner in the United States District Court for the Northern District of Illinois charging, in count 1, the unlawful purchase and possession of heroin in violation of 26 U. S. C. 2553 (a); in count 2, the unlawful sale and transfer of heroin in violation of 26 U. S. C. 2554 (a); and in count 3, fraudulent concealment of heroin in violation of 21 U. S. C. 174 (R. 2–4). On December 26, 1956, petitioner was found guilty by the court on all three counts. He was given a general sentence of 5 years imprisonment and fined $1.00 (R. 52–53). On appeal, the judgment was unanimously affirmed (Pet. 3a–7a).

At the trial, the Government introduced evidence that one Caldwell, while in the custody of federal narcotics agents, was searched for narcotics, found to have none, given $50.00 in marked money, and taken out by the officers to purchase heroin from his source of supply (R. 6–7, 16–17, 29–30). The officers accompanied Caldwell while he made a telephone call and then proceeded with him to petitioner's record store (R. 7, 17, 29). While the officers waited outside, Caldwell entered the store and remained therein for five to ten minutes. The officers could not see inside the store. Upon rejoining the officers, Caldwell was again searched. He did not have the money, nor did he have narcotics in his possession (R. 17). The agents proceeded along the street in their automobile,

let Caldwell out, sped half way around the block until they were in sight of Caldwell again, perceived petitioner walking toward Caldwell, saw their hands meet briefly, and arrested petitioner immediately. The $50.00 in marked money was found on petitioner, and a packet of heroin was found on Caldwell (R. 8–9, 18–19, 30–31).

One of the defense witnesses testified that petitioner was playing cards with him and two other men continuously for about an hour before the arrest, that petitioner got a telephone call and left, and that about five minutes later the witness looked out the window and saw petitioner being put in a squad car (R. 45). Petitioner also testified that he had been playing cards there all of the time for 45 minutes or an hour before his arrest, and that the telephone call was from the clerk at his store who reported Caldwell wanted to give him some money. According to petitioner, this money represented payment on a prior debt. He said that he met Caldwell on the street and Caldwell gave him the money there (R. 47–48).

At the conclusion of the trial, the court delivered an oral opinion. The entire opinion is as follows (R. 50–51):

> The Court has heard the testimony. The uncontradicted evidence is that one Caldwell was arrested, and he was searched. He was given some marked money, five $10 bills of marked money.
>
> He was escorted by the police to a certain location where he was released. He went to a record shop. He was under surveillance there.

He stayed a while, came out, and then the police escorted him to another point on the street, released him, two of them remained in the car, and he was under surveillance.

The uncontradicted evidence is that the defendant Otis Sears was playing cards with three other men during all of the time at the address near the point where Caldwell was released, and that he received a telephone call, and that after receiving the telephone call he went out.

Now, as to the contents of the telephone call, he states he received the call from a girl who worked in his office, and that Caldwell was there, that he would not give her the money but that he would give it to him, and a meeting was arranged.

He went out and met Caldwell on the street and got the money. (T. 357.)

Then comes contradiction or uncertainty in the evidence. However, the court is conclusively of the opinion that after the evidence which the officers introduced here, showing that they searched Caldwell immediately before releasing him and that he had no narcotics on him immediately prior to being released from custody, and that he had narcotics on him when he was apprehended immediately after he joined hands with Sears, and that Sears had the marked money, which is not contradicted, on him, which he said that Caldwell paid him for a debt—that does not impress the court.

The court is of the opinion that the marked money was delivered to Caldwell and the narcotics in question was delivered by the defendant Sears to Caldwell at the same time, and

that there was a consummation of a transaction there, and that the defendant is guilty.

On appeal, petitioner attacked the sufficiency of the evidence to support the finding of guilt. The Court of Appeals summarized the trial court's finding as follows (Pet. 4a):

> * * * one Caldwell, being in the custody of the United States narcotic agents, having been searched, was given $50.00 in marked currency bills; later, the officers, after Caldwell had made a telephone call, proceeded with him to defendant's shop. While the officers waited outside, Caldwell entered the building, returning to and rejoining the officers shortly later. He was again searched; the bills were no longer in his possession, and no narcotics were found on his person. The officers then proceeded to another point near at hand where they observed defendant Sears meet Caldwell, who had proceeded alone, and pass to him, from hand to hand, an object. They immediately arrested Sears, and found in his possession the bills they had given Caldwell, and, on Caldwell, narcotics contained in a brown envelope. Upon these findings, the court found Sears guilty.

These findings, according to the Court of Appeals, "were amply proved by the Government's evidence." Accordingly, the Court of Appeals upheld the conviction.

DISCUSSION

All the evidence adduced by the Government as to the alleged passing of the narcotics (see the Statement, *supra*, pp. 2–3) was circumstantial in nature.

Petitioner denied ever having anything to do with the narcotics found on Caldwell; Caldwell did not testify as to the transaction; and the Government agents standing nearby saw only that the two men clasped hands as they approached each other on the street. In short, there was no eyewitness testimony that petitioner passed the narcotics to Caldwell. But there was eyewitness testimony by Agent Hazer that Caldwell was searched shortly before meeting petitioner on the street and did not then have the narcotics on him (R. 17). The inference, of course, is that Caldwell could have obtained the narcotics only from petitioner on the street.

Despite its circumstantial nature, the Government's evidence is, we believe, more than sufficient, as the Court of Appeals held, to sustain the Government's theory of the case. According to this theory, the transaction was in two steps: first, Caldwell left the marked money at petitioner's store (either with petitioner or someone else); second, petitioner (then in possession of the marked money left at the store) met Caldwell on the street and handed over the narcotics to him. It was on the basis of this version of the facts that the Court of Appeals rejected petitioner's attack on the sufficiency of the evidence.

The difficulty here is that the trial judge's extemporaneous opinion is literally inconsistent with this two-step version of the transaction. According to the opinion, petitioner "went out and met Caldwell on the street and got the money" and the two men exchanged the money and the narcotics "at the same time." Given their literal meaning, these remarks

indicate that the trial judge concluded that Caldwell did *not* leave the money at the store but rather had it on him after leaving the store.

If this is the true meaning of the judge's remarks, it follows that the Court of Appeals has never tested the sufficiency of the evidence to support such findings. Normally, where the judge sits as trier-of-fact in a criminal case, findings are not required. See Rule 23 (c), Federal Rules of Criminal Procedure; cf. *Sullivan* v. *United States,* 348 U. S. 170. However, where findings are actually made, whether requested or not, a reviewing court is not free to sustain a conviction on the basis of a substituted set of findings permitted by the evidence. In this respect, the instant case is quite different from cases in which the trier-of-fact makes no findings.

Moreover, if it is true that the trial judge actually rejected the Government's two-step version of the transaction, a serious question arises as to whether his findings are not internally inconsistent. Agent Hazer testified (R. 17) that he "found no money, no narcotics, no nothing on Caldwell" when he searched Caldwell just before releasing Caldwell to meet petitioner on the street. The trial judge's opinion accepts this testimony as to the narcotics, but apparently rejects the same testimony as to the money; for, according to the literal language of the opinion, Caldwell must necessarily have retained the money on his person after the search so that he could exchange the money for the narcotics at the street-meeting with Sears.

In these circumstances, it is the Government's view that the case should be remanded to the District Court for further proceedings. The trial judge, we think, should be instructed to clarify his findings or, in the alternative, to grant a new trial if he believes that such a disposition would be more appropriate. In the event that the trial judge enters new findings, the way would, of course, be clear for petitioner to obtain fresh review of those findings in the Court of Appeals.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

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